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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

No. 3231.

FREDERICK S. DEITRICK, RECEIVER, ET AL.,
APPELLANTS,
v.
STANDARD SURETY & CASUALTY COMPANY,
APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 5225, LAW DOCKET.

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK (SUBSTITUTED FOR JOHN B. CUNNINGHAM, RECEIVER),
v.
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE.

No. 5316, LAW DOCKET.

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK (SUBSTITUTED FOR JOHN B. CUNNINGHAM, RECEIVER),
v.
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE.

No. 5317, Law Docket.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank (Substituted for John B. Cunningham, Receiver),

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE.

No. 3849, Equity Docket.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.

No. 3850, Equity Docket.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.

No. 3851, Equity Docket.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.

No. 3852, Equity Docket.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.

Seven Cases Consolidated for Appeal.

No. 5225 Law Docket.

Frederick S. Deitrick, Receiver of the Boston-Continental National Bank (Substituted for John B. Cunningham, Receiver), Plaintiff,

v.

Standard Surety & Casualty Company of New York et Trustee, Defendants.

WRIT.

UNITED STATES OF AMERICA.

[SEAL] MASSACHUSETTS DISTRICT, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts, or his Deputy, GREETING:

We command you to attach the goods and estate of Standard Surety & Casualty Company of New York, a corporation duly organized by law with an usual place of business in Boston, Suffolk County, Massachusetts, to the value of sixty thousand dollars, and summon the said defendant (if it may be found in your district) to appear before our judge of our District Court, next to be holden at Boston, within and for our District of Massachusetts, on the fourth Tuesday of June next: then and there, in our said court, to answer unto John B. Cunningham, as he is receiver of Boston Continental National Bank, a national banking association duly organized by law and having an usual place of business in said Boston, plaintiff.

To the damage of the said plaintiff (as he says) the sum of sixty thousand dollars, which shall then and there be made to appear with other due damages. And whereas the said plaintiff says that the said defendant has not in its own hands and possession, goods and estate to the value of sixty thousand dollars aforesaid, which can be come at to be attached; but has entrusted to, and deposited in the hands and possession of The First National Bank of Boston, a national banking association duly organized by law with an usual place of business in said Boston, trustee of the said defendant's goods, effects, and credits, to the said value: We command you, therefore, that you summon the said The First National Bank of Boston (if it may be found in your district) to appear before our judge of our said court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against its goods, effects, or credits, in the hands and possession of the said The First National Bank of Boston and have you there this writ, with your doings therein.

Witness, the Honorable JAMES A. LOWELL, at Boston, the ninth

day of June, in the year of our Lord one thousand nine hundred and thirty-two.

JAMES S. ALLEN, *Clerk,*
by EDITH G. ROLLINS, *Deputy Clerk.*

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss. BOSTON, June 10, 1932.

Pursuant hereunto I have this day, at 1 o'clock and 58 minutes, P. M., attached a chip as the property. Thereafter I summoned the trustee, The First National Bank of Boston, to appear as within directed by giving in hand to V. T. Hanson, Assistant Cashier, at Milk Street, Boston, in said district, a true and attested copy of the within writ. Thereafter on the same day at 2 o'clock and 25 minutes P. M. I summoned the within named defendant, Standard Surety and Casualty Company, of New York, to appear as within directed, by giving in hand to Merton L. Brown, Commissioner of Insurance for the Commonwealth of Massachusetts, two true and attested copies of the within writ, together with $2.00, his legal fee for acceptance of service thereon.

WILLIAM J. KEVILLE, *United States Marshal,*
by JOSEPH A. GATELY, *Deputy.*

The writ in this cause was duly entered at the June Term of this court, A. D. 1932, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, June 28, 1932, the following Declaration was filed:

DECLARATION.

[Filed June 28, 1932.]

Now comes the plaintiff in the above-entitled action and says that on December 22, 1931, he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States, that he duly qualified and is now acting as such receiver.

And the plaintiff says that the defendant duly entered into, ex-

ecuted under seal and delivered to the Continental National Bank of Boston, now known as Boston-Continental National Bank, a written instrument or bond, copy whereof is hereto annexed marked "A" and hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay said Continental National Bank of Boston the sum of forty thousand dollars ($40,000) in the event that four notes of ten thousand dollars ($10,000) each signed by Westchester Discount Corporation were not paid upon the due dates as set forth in said bond, the last due date being April 20, 1931; that some time prior to April 20, 1931, said bond was extended to June 20, 1931, by a written instrument called endorsement, copy whereof is hereto annexed marked "B"; that some time prior to June 20, 1931 said bond was extended to December 20, 1931 by a written instrument called endorsement, copy whereof is hereto annexed marked "C"; that the condition of said bond as extended as aforesaid has been broken in that Westchester Discount Corporation, the principal named therein, has not paid the notes described in said bond according to their terms, but on the contrary has failed, refused and declined to pay said notes and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said notes; that the defendant was duly notified of the default in accordance with the provisions of the bond; that the damages sustained by the plaintiff on account of the default of said Westchester Discount Corporation are in excess of forty thousand dollars ($40,000).

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond with interest from December 20, 1931.

And the plaintiff says that this is an action at law arising under the Constitution and laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States.

By his Attorneys,

MURRAY F. HALL,
GOODWIN, PROCTER & HOAR.

A.

No. $40,000.00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

Schedule of Notes.

Date	Amount	Maturity
Dec. 20, 1930	$10,000.00	January 20, 1931
Dec. 20, 1930	10,000.00	February 20, 1931
Dec. 20, 1930	10,000.00	March 20, 1931
Dec. 20, 1930	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note, the obligee shall notify the Home Office of the Surety Company at 80 John Street, New York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December, A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION
by Joseph Stone, Treas. [SEAL]
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff, Attorney-in-fact [SEAL]

No. 1038

GENERAL POWER OF ATTORNEY

Know all Men by these Presents: That the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and having its executive offices in the City of New York, New York, does hereby make, constitute and appoint Percy G. Cliff or R. L. Carven its true and lawful attorney-in-fact with full power and authority at - - - - to make, execute and deliver, with or without the impression of its corporate seal, for and on its behalf as surety, any and all bonds, recognizances, obligations, stipulations, undertakings, or anything in the nature of any of them, which are or may be allowed, required or permitted by law, statute, rule, regulation, contract or otherwise; all as described and authorized in the resolution of the Board of Directors of the Standard Surety & Casualty Company of New York, hereinafter set out, but reserving to itself full power of substitution and revocation, and the Standard Surety & Casualty Company of New York hereby ratifies and confirms all that its said attorney-in-fact may lawfully do by virtue of these presents, as fully and amply, to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the Company, at the office of the Company, in New York, New York, in their own proper persons.

This power of attorney is made and executed in accordance with and by the authority of the following Resolution adopted by the Board of Directors of the Standard Surety & Casualty Company of New York at a meeting duly called and held on the 14th day of December, 1928.

Resolved, that the president or a vice-president shall have power and authority to appoint assistant secretaries, resident vice-presidents, resident secretaries, resident assistant secretaries and attorneys-in-fact, and to give such appointees full power and authority to sign and to seal with the company's seal, where required, all policies, bonds, recognizances, stipulations and all underwriting undertakings, and may at any time remove any such appointees and revoke the authority given them.

Resolved, that Attorneys-in-fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any of the By-laws of the Company, and to any Resolution adopted by its Board of Directors.

In Witness Whereof, the Standard Surety & Casualty Company of New York has caused these presents to be signed and its corporate seal to be affixed by its proper officers, thereunto duly authorized, at the City of New York, New York, this 5th day of October, 1929.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By: John R. English, Vice-President.

ATTEST: Edward J. Halligan, Assistant Secretary

State of New York
City and County of New York, ss.

On this 5th day of October, in the year 1929, before me personally came John R. English to me known, who, being by me duly sworn, did depose and say: That he resides in the State of New Jersey; that he is Vice-President of the Standard Surety & Casualty Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the Seal affixed to said instrument is such corporate seal; that it was affixed to such instrument by and under authority conferred by the Board of Directors of said corporation; and that he signed his name thereto by like authority. F. H. Colquhoun, Notary Public

B.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Boston Branch Office 33 Broad Street, Percy G. Cliff, Manager
Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931, is hereby extended for a period of two months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of June 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail, of such default.

Witness our hand this twentieth day of April A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff Attorney-in-fact

C.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Boston Branch Office 33 Broad Street, Percy G. Cliff, Manager
Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to

an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931 and subsequently extended for a period of two months until June 20th, 1931, is now further extended for a period of six months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of December 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail, of such default.

Witness our hand this twentieth day of June, A. D. Nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff Attorney-in-fact

At the same term, to wit, June 28, 1932, the following Answer of Trustee was filed:

TRUSTEE'S ANSWER.

[Filed June 28, 1932.]

And now comes The First National Bank of Boston, summoned as trustee in the above-entitled cause; and appears by C. S. Wiggin, one of its assistant cashiers, who for answer says that at the time of the service of the plaintiff's writ on the bank it had an account standing in the name of Standard Surety & Casualty Company of New York on which there was a balance then due of $320.21 and that it had no other goods, effects or credits of the said defendant in its possession or control.

This answer is made under the penalties of perjury.

C. S. WIGGIN,
Assistant Cashier.

We appear for The First National Bank of Boston.

BURNHAM, BINGHAM, GOULD & MURPHY,

Attorneys.

One Federal Street, Boston, Mass.

Also at the same term, to wit, July 19, 1932, the following Defendant's Answer in Abatement was filed:

DEFENDANT'S ANSWER IN ABATEMENT.

[Filed July 19, 1932.]

Now comes the defendant in the above-entitled cause, and appearing specially for this purpose and no other, and without submitting itself to the jurisdiction of this Honorable Court, pleads in abatement of the plaintiff's writ and action for the reasons following, to wit:

On February 23, 1932, the defendant herein duly filed and entered in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts its bill in equity against said Boston-Continental National Bank, of which the plaintiff herein is receiver, alleging in effect that the bond and the endorsements thereon declared upon in this action and described in the plaintiff's declaration herein were made without consideration, security, premium charged or paid or intended to be paid, upon the understanding that they were not binding obligations of the defendant herein, upon the assurance and promise of the said bank that they would not be used or enforced against the defendant herein, that said bond and endorsements were executed without authority from the defendant herein and without its knowledge and consent as said bank well knew, and praying that said bank be enjoined from enforcing or attempting to enforce said instruments, that they be declared null and void and be delivered up to be cancelled, and for such other and further relief as may be necessary and proper. A copy of said bill in equity is hereto annexed marked "A" and made a part hereof.

On April 25, 1932, said Boston-Continental National Bank, by John B. Cunningham as receiver, the plaintiff herein, in said Superior Court, filed a petition for the removal of said bill in equity to this

Honorable Court, a copy of which petition is hereto annexed marked B and made a part hereof, upon which said petition said bill in equity was removed from said Superior Court to this Honorable Court on said April 25, 1932.

On May 18, 1932, this defendant filed in this Honorable Court its motion to remand said bill in equity to said Superior Court, which motion, after hearing, was allowed on June 8, 1932; and said bill in equity was thereupon remanded to said Superior Court, and is now pending there and is numbered 39422 upon the equity docket thereof; a copy of said motion to remand and of the order of court thereon are hereto annexed marked respectively "C" and "D" and made parts hereof.

Wherefore the defendant prays that this writ and action may be abated. By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

Then personally appeared Raymond Baldwin and made oath that the statements of fact hereinabove set forth are true. Before me,

E. HAZEL SULLIVAN,
Notary Public.

Dated Boston, Mass., July 19, 1932.

I, Raymond Baldwin hereby certify that I am of the opinion that there is such probable ground for the above answer in abatement as to make it a fit subject for judicial inquiry, and that it is not intended merely for delay.

RAYMOND BALDWIN.

A.

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity

Standard Surety & Casualty Company of New York, Plaintiff,

v.

Boston-Continental National Bank, and Westchester Discount Corporation, Defendants.

BILL OF COMPLAINT.

1. The plaintiff is a corporation legally established and existing

under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association legally established and existing under the laws of the United States of America, having its usual place of business in said Boston. The defendant Westchester Discount Corporation is a corporation established and existing under the laws of the State of New York having its usual place of business in Mount Vernon in the County of Westchester and State of New York.

3. The plaintiff is informed and believes and therefore avers that on or about December 20th, A. D. 1930 the defendant Westchester Discount Corporation and one Percy G. Cliff executed an instrument a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank executed and delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed marked B and made a part hereof. Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed the instruments entitled "Endorsements" copies of which marked respectively C. and D. are hereto annexed and made parts hereof.

4. The plaintiff is informed and believes and therefore avers that all of the instruments aforesaid marked A. C. and D. were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said cliff.

5. All of the instruments above described copies of which are hereto annexed marked A. C. and D. were executed by the said Cliff

without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instruments marked A. C. and D. or any of them by suit or otherwise.

2. That the said instruments marked A. C. and D. be declared null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

By its Attorneys,

A.

No. $40,000.00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

Schedule of Notes.

Date	Amount	Maturity
Dec. 20, 1930	$10,000.00	January 20, 1931
Dec. 20, 1930	10,000.00	February 20, 1931
Dec. 20, 1930	10,000.00	March 20, 1931
Dec. 20, 1930	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note, the obligee shall notify the Home Office of the Surety Company at 80 John Street, New York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December, A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION
by Joseph Stone, Treas. [SEAL]
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff, Attorney-in-fact [SEAL]

B.

RELEASE.

Whereas, on the twentieth day of December, nineteen hundred and thirty, the Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety and Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having a usual place of business in Boston, as Surety, did execute a Bond to the Continental National Bank of Boston, wherein the said Westchester Discount Corporation as Principal and the Standard Surety and Casualty Company, as Surety, did bind themselves to the said Continental National Bank of Boston in the sum of Forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston in the event that the

said Westchester Discount Corporation should not, within four months from the date hereof, fully pay and discharge to the said Continental National Bank of Boston, the sum of Forty thousand dollars ($40,000.) made on a series of promissory notes aggregating Forty thousand dollars ($40,000.) made by said Westchester Discount Corporation to said Continental National Bank of Boston, bearing date December twentieth, nineteen hundred and thirty each in the amount of ($10,000.) Ten thousand dollars, and maturing respectively on dates of January twentieth, nineteen hundred and thirty-one, February twentieth, nineteen hundred and thirty-one, March twentieth, nineteen hundred and thirty-one and April twentieth, nineteen hundred and thirty-one.

And whereas said Westchester Discount Corporation has fully paid and discharged its obligations under said notes, now therefore, in consideration of the premises and of one dollars ($1.00) in hand, well and truly paid by said Surety Company to said Continental National Bank of Boston, receipt of which is hereby acknowledged, said Continental National Bank of Boston does hereby forever discharge, release and hold harmless, the said Surety Company from any liability whatsoever under, or in connection with, said Bond.

In Witness whereof, said Continental National Bank of Boston has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this twenty-third day of December, nineteen hundred and thirty.

CONTINENTAL NATIONAL BANK OF BOSTON [SEAL]
By Terrell M. Ragan

Signed, sealed and delivered in the presence of
Witness

C.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Telephone Hancock 8811
Boston Branch Office 33 Broad Street, Percy G. Cliff, Manager
Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931, is hereby extended for a period of two months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of June 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston shall notify the Home Office of this Company at 80 John Street, New York City within five days by registered mail, of such default.

Witness our hand this twentieth day of April A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff Attorney-in-fact

D.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Telephone Hancock 8811
Boston Branch Office 33 Broad Street, Percy G. Cliff, Manager
Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931 and subsequently extended for a period of two months until June 20th,

1931, is now further extended for a period of six months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of December 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail, of such default.

Witness our hand this twentieth day of June, A. D. Nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff Attorney-in-fact

B.

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity, No. 39422

Standard Surety and Casualty Company of New York
v.
Boston-Continental National Bank and Westchester Discount Corporation

DEFENDANTS' PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Now come your Petitioners, Boston-Continental National Bank and Westchester Discount Corporation appearing specially without submitting to the jurisdiction of the court but expressly contesting such jurisdiction, and respectfully represent as follows:

1. At all times hereinafter set forth, the defendant Boston-Continental National Bank was a national banking association duly organized and existing under the laws of the United States with a place of business at Boston in said County; that said Bank closed in the regular course of business on Dec. 16, 1931 and did not open thereafter and on Dec. 17, 1931 the Comptroller of the Currency of the United States in accordance with law took charge of the assets of said Bank for the purpose of winding up its affairs; that on Dec. 22, 1931

said Comptroller appointed John B. Cunningham Receiver of said Bank and he duly qualified by executing bond for the faithful performance of his duties as such Receiver in the amount of $400,000; that thereafter, to wit, on the 23rd day of February, 1932, a bill in equity was entered in the Superior Court for Suffolk County by Standard Surety and Casualty Company of New York wherein said Bank is named as a defendant and while the affairs of said Bank were in the hands of said Receiver as aforesaid as the Complainant and its attorneys well knew; that the Complainant did not join the Receiver as party defendant and did not disclose in its bill of complaint the fact that said Bank had ceased to do business some time prior to the filing of the bill and that its affairs were in the hands of a Receiver for the purpose of liquidation; that these facts were well known to the Complainant and its attorneys and were intentionally omitted from the bill of complaint for the purpose of avoiding Federal jurisdiction over the cause.

2. That this cause is a suit in equity to cancel a certain indemnity bond in the principal amount of $40,000 now held by John B. Cunningham as Receiver as an asset of said Boston-Continental National Bank; that it is a suit arising under the Constitution and laws of the United States and is a case for the winding up the affairs of said Boston-Continental National Bank; that the District Court of United States for the District of Massachusetts has original jurisdiction thereof under Section 24 of the Judicial Code of the United States.

3. That your Petitioners desire to remove this suit before trial thereof into the District Court of the United States to be holden in the District of Massachusetts.

4. And your Petitioners offer and file herewith bond with good and sufficient surety for their entry in the District Court of the United States for the District of Massachusetts within thirty days from the date of the filing of this Petition of a certified copy of the record in this suit, and for the payment of all costs that may be awarded by said District Court of the United States, if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

5. And your Petitioners further represent that written notice of this Petition and the bond for removal hereinbefore referred to has been

given to the adverse party prior to the filing of the same by sending such notice to Stewart & Chase, 1 Federal Street, Boston, Massachusetts whose names appear as attorneys for the adverse party on the subpoena served in this case.

6. And your Petitioners therefore pray that said surety and bond may be accepted, and that said suit may be removed to the next District Court of the United States to be held in the District of Massachusetts pursuant to the statutes of the United States in such cases made and provided, and that no further proceeding may be had in this Court.

BOSTON-CONTINENTAL NATIONAL BANK
John B. Cunningham, Receiver
WESTCHESTER DISCOUNT CORPORATION

Commonwealth of Massachusetts

Suffolk, ss. April 22, 1932

Then personally appeared John B. Cunningham and made oath that the foregoing petition by him subscribed is true to the best of his knowledge and belief, Before me, Murray F. Hall
Notary Public

C.

In the District Court of the United States for the District of Massachusetts

Standard Surety Casualty Company of New York, Plaintiff,
v.
Boston-Continental National Bank and Westchester Discount Corporation, Defendants.

MOTION TO REMAND.

Now comes the plaintiff, Standard Surety & Casualty Company of New York, appearing specially for the purpose of this motion only and for none other, and moves this court to remand the above-entitled case to the Superior Court within and for the County of Suffolk in the Commonwealth of Massachusetts for the reasons that (1) This is not a suit arising under the Constitution and laws of the

United States; and (2) it is not a case for the winding up of the affairs of a National Bank.

Attorneys for the Plaintiff.

D.

June 8, 1932.

The receiver not being a defendant and no relief against him being sought the motion to remand is allowed.

H. D. M.

D. J.

This cause was thence continued from term to term to the March Term, A. D. 1933, when, to wit, May 4, 1933, the following Defendant's Answer was filed late by consent:

DEFENDANT'S ANSWER.

[Filed by consent May 4, 1933.]

Now comes the defendant in the above-entitled cause without waiving its bill in equity heretofore filed and now pending before this Honorable Court, and for answer to the plaintiff's declaration says:

1. The defendant denies all the allegations in the plaintiff's declaration.

2. Further answering the defendant says that if any written instruments, such as alleged in the declaration purporting to be executed in the name of the defendant by Percy G. Cliff as attorney-in-fact, have come into the hands of the plaintiff, the same were executed by said Cliff at the request and solicitation of said Boston Continental National Bank without authority from this defendant as said bank well knew, without any consideration or security, without premiums charged or paid or intended to be charged or paid therefor, upon the understanding between said bank and said Cliff that said instruments were not binding obligations of the defendant, that the defendant should never be informed of the existence thereof, and that after remaining in the custody of said bank for a short time they should be returned to said Cliff.

3. And for further answer the defendant says that prior to the date of the writ in this action, to wit, on or about December 23, 1930, said Boston-Continental National Bank executed and delivered to said Cliff a release dated December 23, 1930, a copy of which is hereto annexed, whereby, for the consideration therein expressed, said bank discharged the claim sued upon in this action.

By its Attorneys,

STEWART & CHASE.

RELEASE.

Whereas, on the twentieth day of December, nineteen hundred and thirty, the Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety and Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having a usual place of business in Boston, as Surety, did execute a Bond to the Continental National Bank of Boston, wherein the said Westchester Discount Corporation as Principal and the Standard Surety and Casualty Company, as Surety, did bind themselves to the said Continental National Bank of Boston in the sum of Forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston in the event that the said Westchester Discount Corporation should not, within four months from the date hereof, fully pay and discharge to the said Continental National Bank of Boston, the sum of Forty thousand dollars ($40,000.) made on a series of promissory notes aggregating Forty thousand dollars ($40,000.) made by said Westchester Discount Corporation to said Continental National Bank of Boston, bearing date December twentieth, nineteen hundred and thirty each in the amount of ($10,000.) Ten thousand dollars, and maturing respectively on dates of January twentieth, nineteen hundred and thirty-one, February twentieth, nineteen hundred and thirty-one, March twentieth, nineteen hundred and thirty-one and April twentieth, nineteen hundred and thirty-one.

And whereas said Westchester Discount Corporation has fully paid

and discharged its obligations under said notes, now therefore, in consideration of the premises and of one dollar ($1.00) in hand, well and truly paid by said Surety Company to said Continental National Bank of Boston, receipt of which is hereby acknowledged, said Continental National Bank of Boston does hereby forever discharge, release and hold harmless, the said Surety Company from any liability whatsoever under, or in connection with, said Bond.

In Witness whereof, said Continental National Bank of Boston has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this twenty-third day of December, nineteen hundred and thirty.

CONTINENTAL NATIONAL BANK OF BOSTON [SEAL]
By Terrell M. Ragan

Signed, sealed and delivered in the presence of
Witness

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, December 6, 1934, the following Motion to Amend Defendant's Answer was filed:

MOTION TO AMEND DEFENDANT'S ANSWER.

[Filed December 6, 1934.]

Now comes the defendant, Standard Surety & Casualty Company of New York, in the above-entitled action and moves to amend its answer by inserting therein, after paragraph 3 thereof, the following:

"4. And for further answer, and as a bar to the plaintiff's action, the defendant says that subsequent to the filing of the defendant's original answer in this case the plaintiff brought an action against Fidelity & Deposit Company of Maryland (No. 5498 Law) and there declared upon certain Bankers Blanket Bonds. The remedy sought by the plaintiff in said case against Fidelity & Deposit Company of Maryland was based upon the theory of his disaffirmance of the instrument upon the affirmance of which he seeks to recover from the defendant in the case at bar, the plaintiff there contending that said instrument was invalid and uncollectible as against this defendant;

and said remedy and the theory upon which it was based, and said disaffirmance of said instrument were inconsistent with the remedy here sought. Said action by the plaintiff against said Fidelity & Deposit Company of Maryland was subsequently prosecuted and tried upon said inconsistent theory of disaffirmance, and on October 10, 1934, the parties there filed the following agreement for judgment:

> 'And now come the parties in the above entitled action and agree that entries may be made of "Judgment for the Plaintiff for $100,000 without costs" and "Judgment Satisfied '."

Pursuant to said agreement judgment was entered for the plaintiff in said action in the amount of $100,000. Wherefore the defendant says that the plaintiff, by prosecuting said action to judgment, has elected its remedy against Fidelity & Deposit Company of Maryland on the theory of his disaffirmance of the instrument theretofore declared upon by the plaintiff in this action, and that the plaintiff is barred by said election from recovery against the defendant in the case at bar on the inconsistent theory of the affirmance of said instrument; and that judgment herein should therefore be entered for the defendant."

By its Attorneys,

STEWART & CHASE.

On the tenth day of said December said cause came on to be heard on the motion to amend answer, the Honorable Hugh D. McLellan, District Judge, sitting, and the following Order of court allowing said motion was entered:

ORDER.

December 10, 1934.

December 10, 1934.

McLELLAN, J. Without any intimation whatever as to the validity or invalidity of the alleged defence sought to be set up in the amendment, the within motion to amend defendant's answer is allowed.

HUGH D. McLELLAN,

District Judge.

At the same term, to wit, January 31, 1935, the following motion of Frederick S. Deitrick, Receiver, to be Substituted as Party Plaintiff was filed and assented to:

MOTION OF FREDERICK S. DEITRICK, RECEIVER TO BE SUBSTITUTED AS PARTY PLAINTIFF.

[Filed January 31, 1935.]

Now comes Frederick S. Deitrick and says that he was appointed by the Comptroller of the Currency receiver of Boston-Continental National Bank on September 1, 1934, said appointment to take effect at the close of business on September 29, 1934, in place of James H. Brennan, resigned, who in turn succeeded John B. Cunningham, resigned, as receiver of said bank.

Wherefore he moves that he may be substituted as party plaintiff in this action.

By his Attorneys,

MURRAY F. HALL,
GOODWIN, PROCTER & HOAR.

On the said thirty-first day of January, A. D. 1935, the foregoing motion of Frederick S. Deitrick, receiver, to be substituted as party plaintiff was allowed by the court, the Honorable Elisha H. Brewster, District Judge, sitting.

Also on the same day, the following Waiver of Jury Trial and Agreement of Counsel for Consolidation was filed:

WAIVER OF JURY TRIAL AND AGREEMENT OF COUNSEL FOR CONSOLIDATION.

[Filed January 31, 1935.]

Now come counsel for both parties in the above-entitled action and hereby waive trial by jury in this action and agree that this action may be tried with four bills in equity brought by Standard Surety & Casualty Company of New York against Boston-Continental National Bank, its receiver and others now pending in this court and numbered Equity 3849, 3850, 3851 and 3852; and may be tried with the other

actions at law pending between the same parties and numbered Law 5316 and 5317.

MURRAY F. HALL,
GOODWIN, PROCTER & HOAR,
Attorneys for the Plaintiff.

STEWART & CHASE,
Attorneys for the Defendant.

At the same term, to wit, February 2, 1935, plaintiff's motion for auditor was filed.

On the fourth day of said February, A. D. 1935, the following Rule to Auditor was filed:

RULE TO AUDITOR.

February 4, 1935.

No. 5225, Law Docket.

Frederick S. Deitrick, Receiver of the Boston Continental National Bank,

v.

Standard Surety & Casualty Company of New York, et Trustee.

No. 5316, Law Docket.

Frederick S. Deitrick, Receiver of the Boston Continental National Bank,

v.

Standard Surety & Casualty Company of New York, et Trustee.

No. 5317, Law Docket.

Frederick S. Deitrick, Receiver of the Boston Continental National Bank,

v.

Standard Surety & Casualty Company of New York, et Trustee.

McLELLAN, J. These causes came on to be heard at this term upon plaintiff's motion filed in each case for reference to an auditor, and it appearing to the court that these are proper causes to be heard by an auditor, and neither party objecting thereto, it is

Ordered that W. Barton Leach, Esquire, of Weston, Massachusetts, be, and he hereby is, appointed auditor in the above-entitled actions

to hear the parties and their witnesses, to examine their books, vouchers and evidence, and to report to the court his findings of fact and conclusions of law thereon, said findings of the auditor to be final.

It is further ordered that the auditor may sit anywhere within the District as he may determine; or elsewhere by consent of parties, and that said hearings shall begin on March 11, 1935, and be completed on or before April 1, 1935; that his compensation as auditor in the above-entitled actions and as special master in equity cases Nos. 3849, 3850, 3851 and 3852, between the same parties, shall be at the rate of seventy-five dollars per day; and that the compensation plus expenses and stenographer's fees of said auditor and master shall be paid equally from time to time by the parties and be taxed as costs against the losing party.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

February 4, 1935.

H. D. M.
D. J.

Also at the same term, to wit, February 16, 1935, the following Notice of Frederick S. Deitrick, Receiver, to Admit Facts was filed:

NOTICE OF FREDERICK S. DEITRICK, RECEIVER, TO ADMIT FACTS.

[Filed February 16, 1935.]

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3850 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

No. 3849 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

And now comes Frederick S. Deitrick, as he is receiver of Boston-Continental National Bank in each of the above-entitled actions, and calls upon Standard Surety & Casualty Company of New York to admit the following facts as to each of such actions:

1. That there was an original general power of attorney duly issued by Standard Surety & Casualty Company of New York to Percy G. Cliff or R. L. Carven dated the fifth day of October, 1929 of which the photostatic copy hereto annexed marked A is an exact copy.

2. That the general power of attorney referred to in paragraph 1

hereof was in full force and effect from the fifth day of October, 1929, up to and including the seventeenth day of December, 1931.

3. That the copies of the letters hereto annexed and dated respectively December 21, 1931, June 28, 1932, July 8, 1932 and November 4, 1932.

(a) are true copies of the originals of said letters received by Standard Surety & Casualty Company of New York;

(b) were sent to the Standard Surety & Casualty Company of New York by registered mail;

(c) were mailed by the Boston-Continental National Bank or its receiver upon the dates which said letters respectively bear; and

(d) that each of said letters respectively was received by Standard Surety & Casualty Company of New York in the regular course of the mails shortly after the date which each of said letters bears and were received at its home office in New York City.

4. That at all times while the general power of attorney referred to in paragraph numbered 1 hereof was in full force and effect, Standard Surety & Casualty Company of New York was duly and legally qualified within the Commonwealth of Massachusetts to do all of the kinds of business covered by said power of attorney.

5. That at all times between October 5, 1929 and December 17, 1931, Percy G. Cliff was duly and legally registered in Massachusetts as a general agent of Standard Surety & Casualty Company of New York with full power to write insurance business of the nature covered by the general power of attorney referred to in paragraph numbered 1 hereof.

6. That Percy G. Cliff from time to time between October 5, 1929 and December 17, 1931, acted as the General Manager of the Boston office of Standard Surety & Casualty Company of New York and acting under the power of attorney referred to in paragraph 1 hereof transacted business authorized thereby within the Commonwealth of Massachusetts.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
SAMUEL HOAR.

A.

Standard Surety & Casualty Company of New York
Home Office 80 John Street, New York

No. 1038

GENERAL POWER OF ATTORNEY

Know All Men By These Presents: That the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and having its executive offices in the City of New York, New York, does hereby make, constitute and appoint Percy G. Cliff or R. L. Carven its true and lawful attorney-in-fact with full power and authority at – – – – – to make, execute and deliver, with or without the impression of its corporate seal, for and on its behalf as surety, any and all bonds, recognizances, obligations, stipulations, undertakings, or anything in the nature of any of them, which are or may be allowed, required or permitted by law, statute, rule, regulation, contract or otherwise; all as described and authorized in the resolution of the Board of Directors of the Standard Surety & Casualty Company of New York, hereinafter set out, but reserving to itself full power of substitution and revocation, and the Standard Surety & Casualty Company of New York hereby ratifies and confirms all that its said attorney-in-fact may lawfully do by virtue of these presents, as fully and amply, to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the Company, at the office of the Company, in New York, New York, in their own proper persons.

This power of attorney is made and executed in accordance with and by the authority of the following Resolution adopted by the Board of Directors of the Standard Surety & Casualty Company of New York at a meeting duly called and held on the 14th day of December, 1928.

Resolved, that the president or a vice-president shall have power and authority to appoint assistant secretaries, resident vice-presidents, resident secretaries, resident assistant secretaries and attorneys-in-fact, and to give such appointees full power and authority to sign and to

seal with the company's seal, where required, all policies, bonds, recognizances, stipulations and all underwriting undertakings, and may at any time remove any such appointees and revoke the authority given them.

Resolved, that Attorneys-in-fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any of the By-Laws of the Company, and to any Resolution adopted by its Board of Directors.

In Witness Whereof, the Standard Surety & Casualty Company of New York has caused these presents to be signed and its corporate seal to be affixed by its proper officers, thereunto duly authorized, at the City of New York, New York, this 5th day of October, 1929.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By John R. English, Vice-President.

Attest: Edward J. Halligan, Assistant Secretary.

State of New York
City and County of New York, ss.

On this 5th day of October, in the year 1929, before me personally came John R. English, to me known, who, being by me duly sworn, did depose and say: That he resides in the State of New Jersey; that he is Vice-President of the Standard Surety & Casualty Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the Seal affixed to said instrument is such corporate seal; that it was affixed to such instrument by and under authority conferred by the Board of Directors of said corporation; and that he signed his name thereto by like authority. F. H. Colquhoun,
Notary Public.

December 21, 1931

Standard Surety & Casualty Co. of N. Y., 80 John Street, New York, N. Y.

Gentlemen: In view of the default of the Westchester Discount

Corporation of Mt. Vernon, New York, to pay their obligations bonded by your company to the Boston-Continental National Bank in the amount of not to exceed $40,000, we are writing you by registered mail as required in the wording of the original bond and the extension thereof, demanding payment of $40,782.81 which is that portion of the indebtedness unpaid as of December 20, 1931. The original bond I refer to was executed over the signatures of Joseph Stone, Treasurer of the Westchester Discount Corporation, and Percy G. Cliff, attorney in fact, for the Standard Surety & Casualty Company of New York. Please give this matter your immediate attention and acknowledge receipt of this letter at once.

On November 12, 1931, I wrote to your home office at 80 John Street with reference to the obligation of Gordon A. Robinson, doing business as the Robinson Engineering Company. The subject of this letter referred to the extension of their note with $1,000. monthly payments during the term of a bond held by us signed by Percy G. Cliff, Manager of your Boston branch office. Will you please inform us why we have not heard from you in respect to this matter?

Very sincerely yours,

OA:MH Enclosure—1 Vice President.

P. S. I am enclosing copy of our letter of November 12, 1931, copies of which were sent to Percy G. Cliff and the Robinson Engineering Company.

File No. 1911.

John B. Cunningham, Receiver Boston Continental National Bank
60 Devonshire Street, Boston, Massachusetts.

June 28, 1932

Standard Surety & Casualty Co. of New York, 80 John Street, New York, N. Y.

Gentlemen: You are hereby notified that Joseph Stone of Brockton has defaulted in the payment of his obligation of $52,000. to Boston-Continental National Bank which obligation became due and payable June 2, 1932. Under the terms of the written instrument or bond executed by you as surety under date of June 2, 1931, and being

numbered 9485-31, payment of $52,000. is hereby demanded from you to be made within thirty (30) days of the receipt of this notice.

Very truly yours,

Registered Mail Receiver

July 8, 1932.

Standard Surety & Casualty Company of New York, 80 John Street, New York, N. Y.

Re: Standard Surety & Casualty Company of New York
Bond No. 12420-31 In the Amount of $20,000.

Gentlemen: I hereby notify you that Gordon A. Robinson has defaulted in payment of note of $20,000.00 referred to in the above bond, and in accordance with the terms of said bond I hereby demand payment of $19,000.00, the balance due and unpaid on said note, within thirty (30) days together with interest.

Very truly yours,

J. B. CUNNINGHAM, Receiver.

Registered Mail Return Receipt Requested

November 4, 1932

Standard Surety & Casualty Company of New York, 80 John Street, New York, N. Y.

Re: Standard Surety & Casualty Company of New York
bond dated September 6, 1930 in the Amount of $20,000
in favor of Continental National Bank.

Gentlemen: I hereby notify you that Arthur D. Cronin has defaulted in payment of note of $14,000 referred to in the endorsement dated November 2, 1931, extending the term of the above bond to November 3, 1932.

In accordance with the terms of said bond, I hereby demand payment of $14,000, the amount of said note, together with interest, within thirty days of this notice.

Yours very truly,

JOHN B. CUNNINGHAM,
as he is Receiver of Boston-Continental National
Bank (formerly known as Continental National Bank.)

Registered Mail Return Receipt Requested.

On the twenty-fifth day of said February, the following Answer to Receiver's Notice to Admit Facts was filed:

ANSWER OF STANDARD SURETY & CASUALTY COMPANY TO RECEIVER'S NOTICE TO ADMIT FACTS.

[Filed February 25, 1935.]

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

No. 3850 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

1. An original power of attorney was issued by the Standard Surety & Casualty Company of New York to Percy G. Cliff or R. L. Craven, dated the fifth day of October, 1929, of which the photostatic copy annexed to the notice to admit facts appears to be an accurate copy.

2. The power of attorney referred to in paragraph 1 of the notice to admit facts was in force, except as modified by restrictions and limitations known to Percy G. Cliff, and instructions communicated to him by the Standard Surety & Casualty Company of New York, from October 5, 1929 to December 17, 1931, inclusive.

3. The copies of letters annexed to the Notice to Admit Facts, and dated December 21, 1931, June 28, 1932, July 8, 1932 and November 4, 1932, appear to be true copies of letters received by the Standard Surety & Casualty Company of New York at its home office in New York City in the regular course of the mails shortly after the date which each letter bears.

4, 5, 6. As to the purported facts and conclusions of which the receiver seeks admissions in paragraphs 4, 5 and 6 of his notice to admit facts, the Standard Surety & Casualty Company of New York refuses to admit as facts the matters as there set forth.

By its Attorneys,

STEWART & CHASE,
RAYMOND P. BALDWIN.

This cause was thence continued to the March Term, A. D. 1935, when, to wit, March 22, 1935, the following Motion to Amend Defendant's Answer was filed and allowed:

MOTION TO AMEND DEFENDANT'S ANSWER.

[Filed and allowed March 22, 1935.]

Now comes the defendant, Standard Surety & Casualty Company of New York, in the above-entitled action and moves to amend its answer by inserting therein, after paragraph 4 thereof, the following:

"5. And for further answer, and as a bar to the plaintiff's action, the defendant says that the said Boston-Continental National Bank was the obligee on certain "Banker's Blanket Bonds" issued by the Fidelity & Deposit Company of Maryland, indemnifying said bank against the losses therein specified; that on or about April 8, 1932,

said bank, through its receiver John B. Cunningham, notified said Fidelity & Deposit Company of certain losses which, as he claimed, were covered by said bonds; that on or about April 28, 1932, said bank through its said receiver supplemented its said claim by a letter to said Fidelity & Deposit Company, a copy of which is hereto annexed and made a part hereof; that subsequent thereto and on or about June 2, 1932, said bank through its said receiver, pursuant to the provision of said bonds and in order to recover thereon, filed with said Fidelity & Deposit Company a proof of claim under said bonds, subscribed and sworn to by its said receiver, by which said receiver sought to recover on said Bankers Blanket Bonds on the theory that the alleged bond upon which the action at bar is brought was fraudulent, invalid and uncollectible as stated by said receiver; that subsequently said receiver brought in this court an action against said Fidelity & Deposit Company (No. 5498 Law) in which he sought recovery on said bond in accordance with said claims and theory, and that the plaintiff in said action, who is the plaintiff in the action at bar prosecuted said claims to judgment in said action. Wherefore the defendant says that the plaintiff is barred from recovery on said alleged bond against the defendant in this action."

By its Attorneys,

STEWART & CHASE,
RAYMOND P. BALDWIN.

March 22, 1935. The within motion is allowed.

HUGH D. MCLELLAN, *D. J.*

File No. 1911

John B. Cunningham, Receiver Boston-Continental National Bank
60 Devonshire Street, Boston, Massachusetts

April 28, 1932

Fidelity & Deposit Company of Maryland, 33 Broad Street, Boston, Massachusetts

Attention—Mr. Wilson H. Smith

Gentlemen: Supplementing my letter dated April 8th, you will please find below a resume setting forth specific irregular transactions

which would appear to result in a total loss to my trust aggregating approximately $285,000.00.

1. Bank's loan to Joseph Stone dated April 29, 1930 due and payable July 28, 1930, in the principal amount of $25,000. Said loan was secured by bond of the Metropolitan Casualty & Insurance Company of New York in like amount. This bond was delivered to President, T. M. Ragan upon his request and said bond has since disappeared. Stone, the maker of the loan, is not in a position to pay and through the apparent irregularities on the part of former President Ragan, as relating to the disappearance of bonds, my trust stands to lose $25,000. and interest.

2. $40,000. fraudulent bond of the Standard Surety & Casualty Company of New York purported to be issued to cover loan of this bank to the Westchester Discount Corporation of which Joseph Stone was Treasurer, said loan dated December 30, 1930, in the principal amount of $40,000, said loan due and payable April 23, 1931. As a result of fraudulent bond in the amount above stated, my trust stands to lose $40,000. and interest.

The Westchester Discount Corporation of Mt. Vernon, New York, is now in bankruptcy.

3. A loan made by this bank to the Colonial Realty Corporation of which Joseph Stone was an officer in the amount of $40,000, dated December 30, 1930, due and payable $10,000, January 29, 1931, $20,000 March 2, 1931 and $10,000 March 30, 1931, on which loan the following payments were made: January 30, 1931, Stone paid $10,000. leaving a balance unpaid of $30,000. and interest.

This loan was fraudulently approved by Mr. T. M. Ragan, President of the bank after the Board of Directors had refused to make this loan at their regular meeting.

4. Fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $52,000. purported to be issued on June 2, 1931, as security on loan to Joseph Stone, personally, in said amount. This bond was invalid and resulted from the fraudulent conspiracy of T. M. Ragan, President with Joseph Stone and Percy G. Cliff, the attorney in fact of Standard Surety & Casualty Company of

New York. The amount of the loan is uncollectable, and my trust stands to lose the full amount of $52,000. and interest.

5. Similar fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $20,000. purported to be executed to secure loan on July 8, 1931 to Gordon A. Robinson, doing business as the Robinson Engineering Company. The bond was known to be invalid to T. M. Ragan, President, Percy G. Cliff and Gordon A. Robinson, and as a result of the fraud by trust stands to loss $15,000. and interest.

6. Fraudulent bond purported to be executed by the Standard Surety & Casualty Company of New York in the amount of $20,000. as security on loan to Arthur D. Cronin made on August 23, 1930. The fraudulent issuance of this bond was made under the same circumstances as the other bonds except in this case Arthur D. Cronin participated. The amount of the loan is uncollectable and my trust stands to lose the amount of $20,000 and interest.

The above four bonds form the basis of indictments returned by the Federal Grand Jury against Joseph Stone, Percy G. Cliff and Arthur D. Cronin, and copies of said indictments are enclosed herewith.

7. Note of Mortimer H. Richardson purporting to be signed by Mortimer H. Richardson in the amount of $5400, dated July 5, 1930, due on demand. This note was fraudulently signed by T. M. Ragan, President of the bank, in the name of Mortimer H. Richardson. Mr. Ragan turned over $1,200. to Mr. Richardson to pay this note. The balance of $4,000. is uncollectable and due to the fraud of Mr. Ragan, my trust stands to lose $4,000. and interest.

8. Note purporting to be signed by Dr. Justin F. Grant, dated July 22, 1931 for $13,000. due and payable October 20, 1931. Mr. Ragan fraudulently signed Dr. Grant's name to this note and received the benefit from the proceeds of this loan. This note is uncollectable and my trust stands to lose $13,000. and interest.

9. Loans to Crescent Shoe Company, Keene, New Hampshire, and Peter Kantor, Treasurer. The Crescent Shoe Company owed the bank $61,000. of which $6,500. represented a personal loan to Mr. Kantor. Mr. T. M. Ragan, President of the bank had borrowed

personally from Mr. Kantor $12,500. of which amount $2,500. represented an indebtedness of Joseph Balter, a director of the Boston-Continental National Bank. On November 25, 1931, Mr. Kantor gave Mr. Ragan, as President of the bank, check for $47,900.00. Mr. Ragan made out two checks, one for $10,600, and another check for $2,500. payable to Crescent Shoe Company which he asked Mr. Kantor to endorse. Mr. Kantor endorsed said checks and received all of the notes of the Crescent Shoe Company and personal notes of Peter Kantor stamped "paid" from the note teller of the bank. Mr. Ragan did not turn over to the bank $13,100. representing the difference between the loans of $61,000. and the check for $47,900. This balance is uncollectable and due to the fraudulent conduct of Mr. Ragan, as President, my trust stands to lose $13,100. and interest.

10. Cash received by T. M. Ragan, President in the amount of $3,500. on December 16, 1931. On this date Mr. Ragan received $5,500. cash from the paying teller stating that a check in like amount would be given to him later. About midnight the following morning, Mr. Ragan sent a check of Arthur D. Cronin & Company in the amount of $5,500. to the paying teller to cover the cash withdrawal of Mr. Ragan. At that time the Arthur D. Cronin & Company account had less than $1,000. to its credit. Mr. Ragan caused a check in the amount of $6,325. in the name of Daniel Owen, which check he had received from Arthur D. Cronin, to be deposited in the Arthur D. Cronin & Company account to cover the overdraft covered by the charge of the $5,500. in Cronin's account. The Daniel Owen check was drawn on the Bank of Canada and was returned "unpaid." On account of the fraudulent conduct of Mr. T. M. Ragan, this trust stands to lose $5,500. and interest, as this amount is uncollectable from either Arthur D. Cronin & Company or Daniel Owen.

11. $3,500. paid to T. M. Ragan, President, on December 16, 1931, in the following manner: Mr. Ragan received this cash for three checks totalling $3,500. drawn by E. E. Nazzaro & Company, Inc. on the Plymouth County Trust Company of Brockton, Massachusetts (now closed), an account which was kept there for Mr. Ragan's personal use. The three checks were returned "unpaid" and

are uncollectable from the drawer or from Mr. Ragan's estate. Due to the fraudulent conduct of Mr. Ragan, this trust stands to lose $3,-500, and interest.

12. Loss of $14,808.86 due to items fraudulently kept as cash items in the following manner:—Mr. T. M. Ragan fraudulently purchased capital stock of the Boston-Continental National Bank with the bank's own funds and then carried the stock as cash on hand. The stock of the Boston-Continental National Bank is worthless due to the fact the Boston-Continental National Bank is in the hands of a National Bank Receiver.

13. Cash loss of $4,300. due to the following irregular transactions of Mr. Ragan.—Mr. Ragan received cash for which he gave expense tickets to be charged to the expense account as follows:—On July 16, 1931 $200.00, September 26, 1931 $100.00, October 8, 1931 $1,000.00, October 16, 1931 $1,000.00, October 31, 1931 $1,-000.00, December 11, 1931 $1,000.00, total of $4,300.00, all of these items were fraudulently described as expense items. As nothing can be collected from Mr. Ragan's estate, my trust stands to lose $4,-300.00.

14. Notes purporting to be executed by Mark Levine totalling $19,000. Mr. T. M. Ragan, President, fraudulently signed or caused to be signed the name of Mark Levine to notes amounting to approximately $19,000, which were discounted with the bank and the proceeds used by Mr. Ragan, personally. As a result of this my trust stands to lose $19,000. and interest.

15. A note of $1,903.80 of James W. Batchelder was discounted by Mr. T. M. Ragan, President, for the account of Margaret H. Casey. Mr. Ragan received the proceeds of this note in the form of a cashier's checks payable to Margaret H. Casey, bearing endorsement of Margaret H. Casey. Mr. Ragan fraudulently caused said endorsement to be placed on the bank of this check without her knowledge or authority. Mrs. Casey knew nothing about this transaction and received nothing out of this amount. My trust stands to lose $1,903.80 and interest.

16. Loan of $6,000. to the Blake Process & Machine Company of which James A. Blake was President, Harold K. Osgood, law

associate of Mr. T. M. Ragan's, director, and Ruth Dennis, secretary, was clerk and director. The Industrial Loan & Discount Corporation of which Mr. Ragan was President had a chattel mortgage on all of the personal property of the Blake Process & Machine Company, that mortgage was foreclosed and the company went into the hands of receivership. At the time the $6,000. loan was made, Mr. Ragan knew that the company was financially irresponsible and on account of his fraud my trust stands to lose $4,579.90 and interest, the unpaid balance on this loan.

17. Loan to Irving Kopelman of $40,000. made on July 6, 1931, due and payable October 2, 1931. Mr. Kopelman claims that of this amount he turned over $13,000. to Mr. Ragan for his benefit. Mr. Ragan knew at the time the maker of the loan was irresponsible. Due to the fraud of Mr. Ragan, the bank stands to lose $13,000 and interest.

18. Loans totalling $45,000. were made to E. E. Nazzaro & Company, Inc. on notes secured by collateral, which notes were discounted by the bank and the proceeds were given to Mr. Ragan for his personal use. At the time the notes were discounted Mr. Ragan knew that the maker was irresponsible and that the notes were only collectable out of the collateral. There will be a deficit of around $13,000. after the application of the collateral, and due to the fraudulent conduct of Mr. Ragan, this trust stands to lose $13,000. and interest.

All of the above irregularities on the part of Mr. T. M. Ragan, President of the bank were to be presented to the Federal Grand Jury on the morning of Tuesday, March 1, 1932. Owing to the fact that Mr. Ragan was found dead in his garage around 11:00 A. M. on said morning, these matters were not presented to the Federal Grand Jury so far as Mr. Ragan was concerned.

If further information is desired kindly let me know.

These claims are made without prejudice to further claims due to other irregularities which may lead to the filing of proper claim under the bonds written by your company.

Yours very truly,

JOHN B. CUNNINGHAM, Receiver

JBC:MH Encls.

At the same term, to wit, June 6, 1935, the following Master's and Auditor's Report was filed:

MASTER'S AND AUDITOR'S REPORT.

[Filed June 6, 1935.]

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3850 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

These seven cases raise the question whether the Standard Surety & Casualty Company of New York (hereinafter called the Surety Company) is liable to the receiver of the Boston-Continental National Bank upon four bonds written in the name of the Surety Company by its attorney-in-fact, Percy G. Cliff. The bonds purported to guarantee payment respectively of a note of $20,000 made by Arthur D. Cronin, a note of $40,000 made by Westchester Discount Corporation, a note of $52,000 made by Joseph Stone and a note of $20,000 made by Gordon A. Robinson. In the four equity cases the Surety Company seeks to have the bonds cancelled; the receiver counterclaims upon the bonds. The three law cases are actions by the receiver upon the Westchester, Stone and Robinson bonds. Amendments of the pleadings have made the issues raised in the law and equity cases identical.

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The equity cases have been referred to me as master, and the law cases as auditor under a stipulation that findings of fact shall be final.

The Surety Company contends that it is not liable upon the bonds and is entitled to cancellation thereof upon four grounds:

(1) That the bonds were given by Cliff without authority and without consideration as part of a fraudulent scheme of Cliff and Ragan, the bank's president, designed to deceive various persons as to the soundness of these notes; that Ragan knew of the lack of authority and consideration; and that his knowledge binds the bank and the receiver.

(2) That even if the bonds are binding obligations of the Surety Company they do not cover the now existing obligations of the four note-makers, for various reasons having to do with interpretation of the language of the bonds.

(3) That the notice of default stipulated in the bonds was not given and that such notice is a condition precedent to recovery.

(4) That the receiver by bringing a certain suit against the Fidelity & Deposit Company of Maryland elected a remedy which was inconsistent with the remedy now sought, and that the Surety Company was thereby discharged of any liability otherwise existing.

The facts and the law as to the third defense (notice of default)

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and the fourth defense (election of remedy) are capable of segregation from what may be termed the substantive issues of the cases. Consideration of these questions is therefore postponed until a later portion of this report.

Liability of the Surety Company Apart from Notice of Default and Election of Remedy.

Findings of Fact.

a. The Bank, its President and its Receiver.

For some time prior to August, 1930, Terrell M. Ragan had been president of the Continental National Bank of Boston. On December 27, 1930, this bank consolidated with the Boston National Bank. The consolidated institution was known as the Boston-Continental National Bank. Ragan remained as president of the Continental to December 27, 1930, and was president of the Boston-Continental thereafter until it closed its doors on December 17, 1931. It was then taken over by a receiver appointed by the Comptroller of the Currency under 12 U. S. C. sec. 191. The successive receivers have been John B. Cunningham, James H. Brennan and Frederick S. Deitrick, the last of these having been appointed in October, 1934. In this report "the bank" refers to the Continental National Bank with reference to events up to December 27, 1930, and to the Boston-Continental National Bank with reference to events after that date. There is no contention that the Boston-Continental National Bank does not stand in the same position as the Continental National Bank with reference to the Surety Company.

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b. The Cronin Transaction.

In early August, 1930, Ragan was indebted to one Cronin in an amount exceeding $20,000. Cronin owed something more than

$19,000 to O'Brion Russell & Co. and was being pressed for payment. Cronin had given a check for $19,000 to O'Brion Russell & Co. drawn on the bank, but there was no substantial balance in his checking account. Cronin left for a trip to Nova Scotia and sent to Ragan a thirty-day note upon the bank's form, signed by Cronin in the amount of $20,000; he told Ragan that the check for $19,000 would be presented and that if it were not paid both Cronin and Ragan would be in trouble. On August 23, 1930, Ragan handed Cronin's note to one Harold J. O'Donnell (who was discount clerk and assistant cashier in charge of the loan department of the bank from August, 1930 to December 17, 1931) and told him to discount the note and credit the proceeds to Cronin's checking account. This was done. Cronin's check for $19,000 was shortly presented by O'Brion Russell & Co. and was paid. The purpose of Ragan in making the loan to Cronin was to enable this check to be paid and to keep Cronin and Ragan out of trouble. The note was unsecured and was known by Ragan not to be a sound investment for the bank.

Shortly after the 1st of September, 1930, Cronin and Ragan had a talk with Percy G. Cliff, who was at all material times attorney-in-fact of the Standard Surety & Casualty Company of New York. They asked Cliff to write a bond of his company purporting to secure the Cronin note and to deliver it to Ragan. Ragan, to induce Cliff to give the bond, said that it would be used to show the bank ex-

aminers if they asked to see the collateral on the Cronin note; that Ragan would keep this bond in his own personal file; that Cliff need not notify his company of the bond or keep any record of it in his office; that no premium would be paid; that the bond was simply a piece of "window dressing"; that the bond was valueless, imposed no liability and would not be enforced; that the bond would be returned to Cliff within a few days; that Ragan would give Cliff a release of all liability on the bond running to the Surety Company. At other times Ragan referred to the bond as "wall paper" and a "donkey bond".

Cronin drew up the bond on stationery provided to Cliff by the Surety Company. Cronin and Cliff signed and sealed it. In so doing

Cliff relied on Ragan's statements. The bond purports to secure the Cronin note. A copy appears as Exhibit A to this report. Attached to this bond was a copy of Cliff's power of attorney authenticated by the assistant secretary of the company. Cliff had been provided with a number of these copies (and some originals) to be attached by him, as indicia of authority, to bonds which he might write. This instrument empowered Cliff on behalf of the company

> "To make, execute and deliver, with or without the impression of its corporate seal, for and on its behalf as surety, any and all bonds, recognizances, obligations, stipulations, undertakings, or anything in the nature of any of them, which are or may be allowed, required or permitted by law, statute, rule, regulation, contract or otherwise . . . to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the Company at the office of the Company in New York, New York, in their own proper persons."

A copy of the power of attorney is Exhibit B to this report.

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At the time Cliff was created attorney-in-fact for the Surety Company and given his power of attorney there was delivered to him a printed "letter of instructions". The letter stated that Cliff's power of attorney was unlimited and general in its terms as to the kind of obligation covered, pointed out that powers had to be given in that way for the convenience of approving officers who might not have the knowledge or time which would be required to examine every bond carefully with reference to a limited power of attorney, but added that the power was to be used only in accordance with the terms of the letter of instructions. "We urge you with all firmness never to put the company on a risk by executing a bond unless you are certain that the bond is one included in your authority. In case of doubt, even if delay may result in the loss of the business, do not write the bond. Better be safe than sorry."

The letter enumerated a dozen types of bonds (none of which types included note-guaranty bonds) which the attorney-in-fact was permitted to execute without prior authority from the home office in

each specific instance, and then declared that applications for bonds of all other classes must be referred to the home office by letter or telegram for authorization in each specific instance. The letter specifically denied to the attorney-in-fact authority to execute "supplementary agreements, waivers, acceptances of changes in contracts, etc.". This letter was not called to the attention of Ragan or anyone else connected with the Bank. But at the time Ragan was arranging with Cliff for the Cronin bond Cliff told Ragan (what would have

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been obvious to anyone and was obvious to Ragan) that Cliff had no authority to do what he was doing and that the bonds could not be reported to the home office. The writing of bonds without premium was not within Cliff's apparent authority.

At the time Cliff delivered the Cronin bond to Ragan, and as part of the same transaction, Ragan delivered to Cliff a paper dated September 9, 1930, signed by him as president for the Continental National Bank, purporting to release the Standard Surety & Casualty Company from any obligation upon the Cronin bond. A copy of this release is attached as an exhibit to the bill of complaint in No. 3850 Equity. The terms of the instrument are broad enough to discharge the Surety Company. There is no evidence that Ragan had authority to execute such a release other than the fact that he was president of the bank.

When Ragan received the Cronin bond from Cliff he delivered it to O'Donnell as collateral for the Cronin note. O'Donnell deposited the bond in the collateral files of the bank, which were in his charge. Cliff did not know that this bond, or others, was delivered to O'Donnell.

Neither Cliff nor the Surety Company received any compensation or collateral for writing this bond; Cliff kept no record of the transaction and did not report it to the home office of the Surety Company; the home office first learned of the existence of this bond on December 23, 1931. In writing the Cronin bond Cliff relied upon what Ragan said to him. The same facts are true with regard to the other three bonds in question and all "endorsements" or extensions.

The original Cronin note was for $20,000. It matured on Sep-

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tember 22, 1930. On that date Cronin paid $1500 and gave a new note for $18,500 maturing October 22, 1930. New notes were given in like manner at ten other times. On some of these ten other occasions the new note was for a smaller amount than the old because of a cash payment; on others the new note was for the same amount since there was no cash payment. On some occasions the new note was not given until some time after the maturity of the old, the longest interval being sixty-three days. However, the new note always bore as its date the maturity date of the old note. The last note in this series was for $14,000 given December 9, 1931, dated October 2, 1931, maturing January 4, 1932. It has not been paid in any part.

When a new note was given the old note was stamped "cancelled" and returned to Cronin. When Cronin gave a new note he understood that his obligation to the bank was being renewed, with or without reduction in amount. He did not understand that his obligation was being discharged and a new obligation created. Each of these new notes was discussed at a meeting of the board of directors of the bank at or about the time of maturity of the old note. The new notes were always referred to as "renewals" and "renewal" notes were discussed as a group separately and apart from original loans and notes. I find that both Cronin and the bank intended each new note as a renewal of the old, in whole or in part, and not as a payment. So far as it is a question of fact I find that each new note was a renewal or extension of the note first given.

On March 21, 1931, Cliff at the solicitation of Cronin and Ragan delivered to Ragan an "endorsement", signed by Cliff as attorney-in-

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fact for the Surety Company, purporting to extend the Cronin bond in the amount of $15,000 to May 22, 1931. Another "endorsement" was given on May 21, 1931, purporting to extend the bond in the amount of $15,000 to November 3, 1931. A third "endorsement" was given on November 3, 1931, its terms identical to those of the other two extensions *mutatis mutandis*. It appears as Exhibit C to

this report. Each of these "endorsements" was given by Cliff to Ragan and by Ragan handed to O'Donnell.

c. The Westchester Discount Corporation Transaction.

In December, 1930, Ragan asked Cliff to write a similar bond with reference to a note of the Westchester Discount Corporation in the amount of $40,000. Ragan told Cliff that the Westchester loan was being made to enable Ragan to take up for his own account some stock in a proposed consolidated bank to be formed by the merger of the Continental National Bank with the Boston National Bank; that the loan was amply secured but that there was some possibility of criticism because of the kind of collateral; that the Continental National Bank was going to merge with the Boston National Bank if the bank examiners could be satisfied; that the bank examiners required that 10,000 new shares of stock be subscribed for at 20, and that Ragan had to take up $40,000 of this stock; that the bank examiners might not be satisfied with the Westchester loan unless it were further secured; and that if the merger did not go through the bank examiners might close the bank, and Cronin, Ragan and Cliff would

be ruined. He assured Cliff that the bond, like the Cronin bond, would be merely a piece of window dressing, that there would be no liability under the bond, that a similar release would be given and that both bonds would be returned to Cliff within a few days.

Cliff gave the bond as requested and attached to it an original of his power of attorney. The text of the bond appears in Exhibit D to this report. It is to be observed that the condition of the bond is the payment by Westchester Discount Corporation of four notes dated December 20, 1930, for $10,000 each, maturing at thirty day intervals beginning with January 20, 1931. There never were any notes for $10,000 made by Westchester Discount Corporation and held by the bank. There was one note of the Westchester Discount Corporation for $40,000 dated December 23, 1930, maturing in four months and purporting to be secured by "4 notes signed by Legion Parkway Realty Corp. . . . Val. $40,000". There was no evidence as to whether these latter four notes were endorsed by Westchester Discount Corporation or whether they were ever paid.

Cliff received a release dated December 23, 1930, executed by Ragan for the bank, which was broad enough in terms to release the Surety Company from all liability under the Westchester bond. There was no evidence that Ragan had authority to execute this release, except the fact that he was the bank's president.

Ragan, after receiving the bond from Cliff, delivered it with the Westchester note to O'Donnell with instructions to discount the note and credit the proceeds to the account of the Westchester Discount Corporation. This O'Donnell did.

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The Westchester Discount Corporation paid $1050 on account of this loan on January 20, 1931. No other amount was ever paid. No new note was given.

On April 20, 1931, Cliff at the solicitation of Ragan delivered to Ragan an "endorsement" signed by Cliff as attorney-in-fact for the Surety Company purporting to extend the Westchester bond in the full amount to June 20, 1931. A second "endorsement" was given on June 20, 1931, its terms being identical to those of the first "endorsement" *mutatis mutandis*. It appears as Exhibit E to this Report.

d. The Stone Transaction.

On June 2, 1931, Joseph Stone owed the bank $51,700 upon existing notes. On that date Ragan told Cliff that the bank examiners were in the bank; that there was a note of Stone's in an amount which, with interest, would exceed $52,000; that he had told the examiners that this loan was covered by a bond; and that if Cliff would give another bond for $52,000 to be shown to the bank examiners Ragan would be able to give him back all three bonds. Cliff gave the bond on June 2, in the form of Exhibit F to this report. No power of attorney or copy of a power was attached to this bond. A release dated June 4, 1931, was given as in the two previous cases, its terms being broad enough to release the Surety Company from all obligation. There was no evidence of Ragan's authority to give the release except that he was the bank's president. On June 4 a new note was given by Stone which increased his total indebtedness to

the bank to $52,222.75. This increase represented the amount of

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the discount on the new note, which customarily is paid in cash at the time a renewal note is given but which in this instance was added to the principal obligation. The indebtedness of Stone to the Bank dates from July, 1930, at which time original notes were given and the proceeds thereof were received by Stone. The notes existing on June 2, 1931, were renewals of these original notes. There were no "endorsements" with reference to the Stone bond.

The indebtedness of Stone, totalling $51,700 on June 2, 1931, and $52,222.75 on June 4, 1931, was represented by several notes. The total indebtedness of Stone to the bank upon these notes and other notes given in substitution therefor was at no time less than $52,000 between June 4, 1931, and the present date. As any note of Stone's fell due between June 4 and December 17, 1931, a new note was given by Stone, the procedure being the same in all respects as in the case of Cronin. Stone's intention in making these new notes was the same as that of Cronin; the bank's practice and intention with reference to new notes of Stone were the same as with reference to new notes of Cronin. I find that both Stone and the bank intended each new note as a renewal of the old, and not as a payment, and that both intended the original obligation to continue. So far as it is a question of fact I find that each new note was a continuation of the obligation existing on June 2, 1931.

e. The Robinson Transaction.

On July 7 and 8, 1931, Ragan told Cliff that a loan was to be made to Gordon A. Robinson, doing business as Robinson Engineering Company, for $20,000; that the loan was really for the benefit of

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Cronin, who was Robinson's brother-in-law, but that there had been some criticism of the Cronin loan so that it was inadvisable to give the loan in Cronin's name; that Cronin was to get the money; that the note was to be secured by a certificate of deposit for $4,500 but that additional security was necessary and a bond was needed, that a release would be given as in the other cases, that this would be the

last bond Cliff would have to write. Ragan told Cliff why a bond was needed, but Cliff has forgotten the reason given. Cliff, however, understood that this bond, as well as the others, was to be used for the purpose of giving the appearance that the loan was secured by a surety bond, and he knew that the bond was to be shown to the bank examiners.

Cliff gave the bond on July 8, in the form indicated by Exhibit G to this report. No power of attorney or copy was attached to this bond. Later on the same day, and as part of the same transaction, Ragan delivered to Cliff a release in substantially the same form as the previous releases, the release being broad enough in terms to release the Surety Company from all obligation under the bond. There was no evidence of Ragan's authority to give the release except his position as the bank's president. The bank on July 8, 1931, after receiving this bond, discounted a note of Robinson's for $20,000, maturing November 9, 1931, put $4,593.33 of the proceeds under a certificate of deposit which was additional security for the note, and credited Robinson's account with $15,406.67. Cronin got the amount thus credited. The loan was made for his benefit.

On November 12, 1931, three days after the maturity of this note,

$1,000 was paid to the bank on account of this obligation, and Robinson at the solicitation of Cronin gave a new note for $19,000 maturing December 9, 1931. There was no evidence as to the intention of Robinson in giving this new note. The intention of Cronin, so far as material, was the same as with reference to new notes signed by himself; the intention and practices of the bank were the same as in the case of Cronin's new notes. I find that Cronin and the bank intended the new note as a renewal of the old and not as a payment. So far as it is a question of fact, I find that the new note was a renewal of the old and not a payment thereof. No other renewal or extension was given. By application of the certificate of deposit and by other payments the balance due on the Robinson account has been reduced to $14,403.52, exclusive of interest. There were no "endorsements" given with reference to the Robinson bond.

f. Certain general findings with reference to the acquisition of the bonds and the making of the loans.

All of the foregoing transactions were carried out in large part by O'Donnell, acting under Ragan's direction and in performance of his routine duties. When a note was received Ragan handed it to O'Donnell with directions to discount it; and O'Donnell made the necessary book entries and notified the necessary bookkeepers and tellers to carry out this order. When a bond was received Ragan handed it to O'Donnell, who placed it in the collateral files of the bank which were in his charge. Occasionally O'Donnell reminded

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Ragan that one of the bonds was expiring and needed extension by an endorsement. O'Donnell also reminded note-makers of the maturity of their notes and the necessity of payment; but he had, and exercised, no authority to take renewal notes in lieu of payment without orders from a superior. With reference to the transactions heretofore described, O'Donnell at no time acted in an independent executive capacity. Neither he nor any other officer or employee of the bank except Ragan had anything to do with negotiating for the bonds and "endorsements" here in question.

Neither O'Donnell nor any other employee or officer of the bank, except Ragan, knew or had reason to know that there was any limitation upon Cliff's authority or any infirmity in these bonds or that the bonds were not the binding obligations they purported to be, until after the bank had closed its doors. The bonds and the notes they secured were discussed at directors' meetings and Ragan, at the request of a director, produced one or more of the bonds. All of the loans and renewals were granted by Ragan without prior consultation with the directors. But each loan and renewal was reported to the directors shortly after it was made; and each was approved by them. In thus approving the directors relied upon the bonds; and this reliance was reasonable.

The Surety Company under its charter and its admission to do business in Massachusetts was empowered to write bonds of the type

here in question. Cliff was a duly licensed agent of the Surety Company. The terms of his power of attorney were sufficiently

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broad to cover authorization to write bonds of the type here in question. The Surety Company supplied Cliff with forms of bonds, letterheads and its corporate seal.

Cliff's reputation for probity in Boston and in the insurance business generally was excellent. The Surety Company was not negligent in employing him or in furnishing him with the power of attorney, stationery and seal. The officers and agents of the bank other than Ragan were not negligent in failing to suspect wrongdoing on his part. There is no indication that Cliff personally benefited from the writing of any of these bonds. Cliff was told specifically that these bonds were to be shown to the bank examiners if called for. From the general circumstances surrounding the writing of the bonds (heretofore set forth) I infer and find that Cliff also knew that these bonds would be shown to the bank's directors, to the representatives of the Boston National Bank in merger negotiations, and to any other person entitled to enquire as to the soundness of the notes they purported to secure, and that the purpose of the showing would be to deceive the person so enquiring.

g. Reliance upon the bonds by creditors of the bank.

Subsequent to the giving of the Cronin bond, three bank examinations were made by the national bank examiners acting under the Comptroller of the Currency. The first examination was on October 6–7, 1930. The Cronin bond was examined, and the examiner concluded that the Cronin loan was not slow, doubtful or a loss (these being the three classifications for undesirable paper) and so reported.

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The second examination was conducted February 21–March 3, 1931. The Cronin and Westchester bonds were examined, and the examiner concluded that these two loans were not slow, doubtful or a loss and so reported. The third examination was conducted August 20–September 5, 1931. All four bonds were examined and the loans were not criticized in the report with the exception of the Stone

loan which was classified as "slow" because it appeared that the Bank might not be paid until the bond expired. In the course of this examination, the examiner talked with Cliff and was assured that the bonds were all right; he also checked the authority of the Surety Company to do business in Massachusetts and Cliff's qualification as agent, and found both satisfactory.

If these loans had not been secured by surety bonds believed to be valid the major portion of the Cronin and Stone loans would have been classified as "loss" and the balance "doubtful"; the Robinson and Westchester loans would have been classified temporarily as "doubtful", and at least the Robinson loan ultimately as "loss". The national bank examiners were deceived by the bonds and reasonably believed that they secured the notes. While a careful textual examination of the Westchester bond would have raised at least a doubt as to whether it secured the $40,000 Westchester note, I do not find that the failure to discover this circumstance was negligent or unreasonable. The reports of these examinations were prepared in quintuplicate and distributed to the bank, the Comptroller of the Currency, the Federal Reserve Bank, the chief examiner of the district, and the examiner.

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The examination of February 21–March 3, 1931, disclosed a capital impairment of $43,000 due to a depreciation of $215,000 in the value of bonds held as investments. The bank's capital was $1,000,000. The Comptroller of the Currency insisted that $300,000 in new money be put into the bank, and threatened a notice of capital impairment under 12 U. S. C. sec. 55. Upon representations that the money was being raised the time for remedying the impairment was extended to July 1, 1931.

On June 29, 1931, J. Dudley Clark put $300,000 into the bank. See the decision of Judge Brewster in *Clark* v. *Boston-Continental National Bank*, 9 F. Supp. 81. (It should be observed that the date at the end of the paragraph numbered (1) on 9 F. Supp. 83, should be 1931, not 1930.) This case holds that Clark is a general creditor of the bank. Since the hearings before me commenced, a judgment for the plaintiff has been entered in this case; and $81,250 has been

paid to Clark by the receiver in satisfaction of that judgment, the amount representing the balance due to Clark on the basis of the estimated dividend upon his claim and the set-off arising out of Clark's stockholder's liability.

The motivation of J. Dudley Clark's action in putting $300,000 into this bank was complex. The matter was first broached to him by a customer of his brokerage firm, and there is no question that his interest was stimulated by the fact that he was a stockholder to the extent of $18,000, and that several of his customers were heavily committed. It was suggested to him that an investment in this bank would cause him to acquire customers, and this proved to be the fact.

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A connection at the bank furnished the chance of a favorable opening for his son. But I find that these factors went no further than to cause Clark to investigate the proposition and to predispose him in its favor if investigation should show that an investment in the bank would be sound. This investigation proceeded upon several lines:

1. He directed his son, Forrester, to go over the affairs of the bank in detail. Forrester went over the loan cards individually with Ragan and was told by Ragan that the Cronin, Westchester and Stone loans were secured by surety bonds, not naming the company. Forrester did not see the bonds; but I find that the existence of the bonds and their availability for inspection by Forrester made it possible for Ragan to state with impunity that they existed and that that statement would not have been made if the bonds had not existed. Forrester reported to Clark that he had gone over the loans with Ragan and that these three loans were secured by surety bonds. From these facts I conclude and find that Clark indirectly relied upon the Cronin, Stone and Westchester bonds.

2. He was told by Ragan that the bank examiners and the Comptroller of the Currency required that $300,000 be put into the bank to remedy a deficiency in the bond account and that, with that con-

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tribution, the bank would be allowed to continue in business. This was true. Before the money was finally put in, the Comptroller of the Currency approved the contract between the bank and Clark, and

Clark was officially notified to that effect. He understood that the bank had been inspected by the national bank examiners and that it was as a consequence of that inspection that the Comptroller had imposed a requirement that $300,000 be contributed—and had imposed no further requirement. This was true. Clark relied upon this fact. I find that the Comptroller relied directly upon the examiners' having seen the Surety Company bonds; that he would have imposed further requirements if it had been known that the Cronin and Westchester loans were unsecured; that Clark relied upon the willingness of the Comptroller to allow the bank to continue in business upon contribution of $300,000 as an indication that the condition of the bank was otherwise sufficient for continuance of business; and that Clark therefore indirectly relied upon the existence of the Cronin and Westchester bonds.

3. Clark examined the last published statement of the bank, and relied upon its contents. There is no sufficient evidence before me to enable me to find whether or not that statement would have been

different if it had been known that the Cronin and Westchester loans were unsecured. Clark did not see a copy of the report of the examiners; but he tried to get it and received from Ragan an explanation, satisfactory to Clark, why it was not available. Clark desired an independent audit of the bank, but was informed that the time allowed by the Comptroller for remedying the capital impairment was too short to permit such an audit to be made. It may thus be said that accurate and complete accounting information was sought but not obtained.

4. Clark had extended talks with Ragan, and relied greatly upon them. He had tremendous confidence in Ragan's integrity and judgment. He discussed some loans with Ragan and accepted Ragan's statements that the borrowers were known to him and were good. Under the circumstances he would have taken Ragan's word as to the validity of any loan. But the circumstances in which Clark's mind was working included two factors in which the existence of the bonds had induced unjustifiably optimistic reports (Forrester's statements and the Comptroller's attitude) and a third in which they may

have had some effect (the published statements). And there are limits to credulity. One loan might have been approved on Ragan's

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unsupported statement, but not three totalling $112,000. It is plain from Clark's other activities that his reliance upon Ragan was not total or exclusive.

5. Clark talked with the attorney for the bank, and several stockholders and directors. In part he relied upon their statements.

I find that the information received from Forrester and the inference of soundness drawn from the Comptroller's action were both substantial factors in inducing Clark to put in this money. I find that the existence of the Cronin, Stone and Westchester bonds induced Forrester's statements and that the Cronin and Westchester bonds induced the Comptroller's action. And I therefore conclude and find that Clark relied upon the existence of these bonds in investing $300,000 in the bank.

On three occasions, namely April 3, 1931, July 10, 1931, and October 14, 1931, the cashier of the bank published in the Boston Transcript a statement of condition of the bank, given pursuant to a call from the Comptroller of the Currency. Publication of the statement given in response to the call is required by law. 12 U. S. C. sec. 161. Each statement contained a single figure showing the amount of "loans and discounts". In each of these figures the amounts of such of the Cronin, Westchester, Stone and Robinson notes as were at the time outstanding were carried at face value. There was no division between secured and unsecured loans. There is no evidence sufficient to enable me to find whether or not these published statements would have been in any different form if the surety bonds had not existed. No evidence was offered that any

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depositor or other creditor saw or relied upon these published statements. I therefore do not find that any creditor relied upon the published statements of condition.

On the other hand it is perfectly clear that the Comptroller of the Currency and the national bank examiners relied upon these bonds as valid obligations of the Surety Company to the extent that the

bonds were outstanding at the time of each of the three examinations. I infer from the history of the relations between this bank and the Comptroller and his examiners, that knowledge of the uncollectibility of some $120,000 of its loans (over 10 percent of its capital) would have been the occasion for whatever vigorous action for the protection of old depositors and the prevention of loss to potential new depositors the Comptroller could take. And the powers of the Comptroller are substantial. He can appoint a receiver for a national bank if he finds its capital impaired and the impairment is not remedied within three months of notice given (12 U. S. C. sec. 55).

He may also appoint a receiver if he "shall become satisfied of the insolvency" of the bank (12 U. S. C. sec. 191); and the jurisdictional fact authorizing receivership is not the actual insolvency of the bank but the Comptroller's opinion that it is insolvent. *U. S. National Bank of La Grande* v. *Pole*, 2 F. Supp. 153, 159 (D. Ore.). Even prior to the Act of June 16, 1933, c. 89, sec. 28 (a) (b), the Comptroller and his examiners made a practice of recommending improvements in the condition of banks and exerting pressure to see that they were carried out. Heinberg, the office of the Comp-

troller of the Currency (1926), page 25. For an example of such pressure, see *Rankin* v. *City National Bank*, 208 U. S. 541, 542. I find that the failure of the Comptroller of the Currency to exercise his legal and practical authority to require the actual infirmities in the loans here in question to be corrected was in reliance on the supposed validity of the bonds now in suit. Subsequent to the bank examination of August–September, 1931, new deposits were made in the bank in an amount exceeding $300,000. The depositors of these sums are still creditors of the bank in an amount exceeding the face value of the bonds.

Whether the sequence of events stated in the preceding paragraph should produce a finding that depositors subsequent to the August–September examination relied upon the bonds is, I take it, mainly a question of law. I rule that these facts justify a conclusion that the depositors did so rely; and I draw that conclusion. It

is the function of the Comptroller of the Currency and national bank examiners to protect the depositing public by making the examinations and imposing the requirements which an individual depositor cannot make or impose, legally or practically. *Third National Bank* v. *Reichert,* 101 Mo. App. 242, 252. Documents upon which the examiners directly rely are, *ipso facto,* indirectly relied upon by the depositing public. See *Murphy* v. *Gumaer,* 18 Colo. App. 183, 190. If it be said that the depositors did not rely on the bonds, that the Comptroller is in no strict sense the agent of the depositors, and that the finding of reliance is thus to some degree fictional, the proposition may be restated as follows: Since the Comptroller and

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the examiners are constituted by law as an authority to take for depositors collectively the protective measures which they cannot individually take for themselves, a reliance by the Comptroller and examiners should have the same legal consequences as a direct reliance by the depositors.

It would not, I think, accord with common sense to conclude that the existence of $120,000 of surety bonds as collateral for paper which was otherwise nearly valueless had no effect upon the action of creditors of the bank. The complexities of the bank's internal organization and external relationships make it extremely difficult to trace the precise channel through which the existence of the bonds induced reliance by creditors. But in my opinion this influence has been sufficiently traced in the case of Clark and of depositors. My attitude toward this question of fact is influenced to some extent by the circumstance that the proof of reliance in this case seems more direct than in other reported cases involving the same problem. See authorities cited under ruling number 4.

As of December 31, 1934, the bank owed over $3,000,000 to general creditors including Clark and the depositors above referred to, and the fair value of its assets available for paying these creditors was $170,000. I find that if the bonds here in suit are collected in full with interest, creditors will not receive full payment.

LIABILITY OF THE SURETY COMPANY APART FROM NOTICE OF LOSS AND ELECTION OF REMEDY.

RULINGS OF LAW.

1. I rule that the contracts here in suit are Massachusetts contracts. The issues of law involved in these cases are part of that "general jurisprudence" as to which, within the decision of *Swift* v.

Tyson, 16 Pet. 1, federal courts are not bound by the judge-made law of any particular state. *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543, 558, 559; *Niagara Fire Ins. Co.* v. *Pospisil*, 59 F. (2d) 709 (8th C. C. A.); *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet. 495. Massachusetts statutes are conclusive so far as applicable.

2. I rule that the bonds and "endorsements" in suit are binding obligations of the Surety Company in spite of the limitations on Cliff's authority contained in the "Letter of Instructions" and in spite of the fact that the bonds were written without premium, unless Ragan's knowledge of these infirmities binds the receiver.

It is unquestioned that the writing of bonds of this type was within the published authority of Cliff as set forth in his power of attorney attached to the Cronin and Westchester bonds. It is equally unquestioned that Ragan knew of circumstances which put the writing of these particular bonds beyond the authority of Cliff, and that no other person connected with the bank had this knowledge. The validity of the bonds thus becomes a matter of determining who is bound by Ragan's knowledge.

The same is true as to the "endorsements". Counsel for the Surety Company make the point that, while the bonds are under seal, the endorsements are not and that the absence of actual consideration for them is a fatal defect. It is true that no premium was paid for these extensions of the bond obligations. But benefit to the promisor is not of the essence of consideration. Detriment to the promisee is equally effective. In these cases the bank forebore from suing on the bonds and permitted the note obligations to be renewed; and this is a sufficient *quid pro quo* to support the endorsements as contracts.

3. I rule that the bonds and "endorsements" in suit were not bind-

ing obligations in the hands of the bank as a going concern, for the

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reason that Ragan's knowledge of their infirmities is imputed to the bank; and that the bonds and "endorsement" would not be binding obligations in the hands of the receiver, if his rights were derived solely from the bank as distinguished from its creditors.

The general rule is that knowledge of an agent acquired in the course of conducting his principal's business is imputed to the principal. An exception exists where the agent is engaged, alone or with others, in a scheme to defraud the principal, the reason being either that the usual presumption that the agent will disclose his knowledge to the principal is without foundation where the agent is acting adversely (*Gunster* v. *Scranton etc. Co.*, 181 Pa. 327), or that the agent under these circumstances is not in any true sense acting in the course of his employment (*Henry* v. *Allen*, 151 N. Y. 1). See 2 Mechem, Agency (2d ed.), secs. 1816, 1817; Seavey, Notice Through an Agent, 65 U. of Pa. L. Rev. 1, 16, 17. But, regardless of the agent's fraud, if the principal asserts a title to property or claim under a contract procured by the act of the fraudulent agent, the principal in this assertion becomes charged with the agent's knowledge.

Traditional metaphors apart, the reason appears to be that the principal, in asserting the title or contract right procured by the agent, ratifies the act of procurement and thus remedies the original defect in the principal-agent relationship. Where the principal must trace his title to the property or chose in action through the act of the fraudulent agent he is bound by knowledge of the agent acquired in doing the act. This rule is well settled in the general jurisprudence of this country. *Curtis, Collins & Holbrook Co.* v. *United States*, 262 U. S. 209, 222, 223; *Tremont Trust Co.* v. *Noyes*, 246 Mass.

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197, 207; *First National Bank* v. *Burns*, 88 Ohio St., 434; *Brownell* v. *Ruwe*, 220 N. W. 588 (Neb.); 2 Mechem, Agency (2d ed.) secs. 1817, 1818; Restatement of Agency, sec. 274, particularly comment b; same, sec. 282 (2c).

Plainly the rule just stated can have no application if the principal

is not in fact compelled to trace his title through the act of the fraudulent agent but can rely upon representation by some other agent who was innocent of the fraud or guilty knowledge. *National Bank of Grafton* v. *Babbidge,* 160 Mass. 163; *Broadway National Bank* v. *Heffernan,* 220 Mass. 247. It is strongly urged by counsel for the Bank that Ragan was not its sole representative in the transactions by which these bonds were obtained but that O'Donnell was its agent in taking the bonds and making the loans and that the discount committee represented it with reference to extension or renewal notes. This position does not seem to me tenable.

O'Donnell had no executive authority. He was a ministerial officer taking orders from his superior who, in this case, was Ragan. He had no discretion to make a loan without directions from above or to decline to discount a note presented to him by Ragan. Unquestionably the Cronin transaction had to be participated in by several clerks, bookkeepers and tellers before Cronin actually got his money; but this does not obscure the fact that Ragan was the sole person representing the Bank in obtaining the Cronin bond within the reason of the rule of law here being considered. The discount committee had no part in the business until some considerable time after each

of these bonds had been procured and deposited in the collateral portfolios of the bank. Precisely similar contentions as to a like employee and investment committee were made and rejected in *Tremont Trust Co.* v. *Noyes,* 246 Mass 197, 208.

Certain cases cited for the receiver are distinguishable. In *National Bank of Grafton* v. *Babbidge,* 160 Mass. 163, the innocent cashier was held to be the sole representative of the bank in discounting a note at the request of the president, where the proceeds of the note were deposited by the cashier to the president's account. The case is distinguishable on the ground that it was apparent on the face of the transaction that the loan was for the benefit of the president and that he was on the opposite side of the transaction from the bank; if the bank was represented at all in the transaction it was by the cashier. See 2 Mechem, Agency (2d ed.) sec. 1817, citing the Babbidge case at n. 82. *Broadway National Bank* v. *Heffernan,* 220

Mass. 247, is one in which the loan was granted by the authority of the discount committee of the board of directors and not by that of the fraudulent cashier. In the case at bar the loans were granted by Ragan's sole authority. In *Cooper* v. *Gilbert,* 40 F. (2d) 260 (10th C. C. A.) and *Tanners National Bank* v. *Dean,* 283 Mass. 151, the person being sued by the bank himself colluded with the fraudulent officer to deceive the bank. To whatever extent these cases are inconsistent with the principle here stated, they fail to correspond to the weight of reasoned authority.

Indian Head National Bank v. *Clark,* 166 Mass. 27, is squarely

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opposed to the ruling I have made, at least as regards the Westchester and Robinson transactions, in which new money was paid out by the bank upon the delivery of a bond. In that case a note was discounted by the bank, whose sole agent in the transaction was its cashier. The note had been signed without consideration by its makers, and the cashier knew this fact. The note was discounted by the cashier as part of a scheme to defraud the bank and he appropriated the proceeds of the note. It was held that the bank could recover upon the note and that the knowledge of the cashier was not imputable to it.

The opinion of Mr. Justice Barker states that there are two independent exceptions to the usual rule that notice to the agent is attributed to the principal: (a) where the agent is for the moment an adverse party and the principal is represented by other agents, the knowledge of the agent is not imputed; (b) where the agent, though he be the sole agent, is at the same time committing an independent fraudulent act upon his own account, his knowledge is not imputed. I am convinced that in situations where, as in *Indian Head National Bank* v. *Clark,* the principal is suing upon the contract obtained by its fraudulent agent acting alone, this decision is out of line with the great weight of authority and has been overruled *sub silentio* in the Massachusetts Supreme Judicial Court. The case is indistinguishable from *Tremont Trust Co.* v. *Noyes,* 246 Mass. 197, and I take the following language of Rugg, C. J. (at 207), as denying the principle enunciated in the Clark case:

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"Where the assets of the principal are by the hand of the treacherous agent in execution of the fraud exchanged for the new security, be it note or other thing of value, then the knowledge of the agent is imputed to the principal. If the faithless officer acts alone in discounting a note and misappropriating the proceeds, then the bank is bound by his knowledge of the circumstances under which he had obtained it from the defendants."

The cryptic and somewhat contradictory remarks in *Chapple* v. *Merchants National Bank,* 284 Mass. 122 at 138 and 139, do not seem sufficient to resurrect the rule thus definitively interred.

4. I rule that the bonds and "endorsements" in suit are binding obligations in the hands of the receiver due to the fact that he represents the bank's creditors.

In the first place it seems perfectly clear that if the Surety Company, by its duly authorized principal officers, had given these bonds for the purpose of deceiving the national bank examiners and creditors, the receiver could recover upon the bonds, regardless of absence of premium and of the existence of an agreement that the bonds were not to be enforceable obligations. The foreseeable reliance upon these bonds of bank examiners and creditors would estop the Surety Company to deny the representations of enforceability explicit in the terms of the instruments. The cases establish that the receiver as the representative of creditors may assert the estoppel *in pais* thus arising. *Lyons* v. *Benney,* 230 Pa. 117 (national bank); *Murphy* v. *Gumaer,* 18 Colo. App. 183 (national bank); *Skordal* v. *Stanton,* 89 Minn. 511 (state bank); *Shaw* v. *Borchers,* 46 S. W. (2d) 967 (Tex.;

state bank). See also *Hurd* v. *Kelly,* 78 N. Y. 588; *Ashley* v. *Rowe,* 101 Fla. 110. The rationale of these cases is stated in *Lyons* v. *Benney,* 230 Pa. 117, 119–120, as follows:

"When an act has been done in fraud of the rights of the creditors of the insolvent corporation the receiver may sue for their benefit, even though the defense set up might be valid against the corporation itself. In such a case he may maintain an action

which the corporation itself could not . . . This appellant was a party to a scheme of the officers of the bank to enable them to make a deceptive and fraudulent showing of assets, and as the fraud was perpetrated upon the creditors, now represented by the bank's receiver, he can maintain an action on the note for their benefit."

And again in *Murphy* v. *Gumaer,* 18 Colo. App. 183, 190–191:

"The defendant was instrumental in clothing the bank with such an appearance of genuine assets as induced the comptroller to regard it as sound and to suffer it to continue in business. In the reports which were transmitted to him, these notes figured as resources; and the public had a right to rely on the reports when they were published. If the defendant was not liable on the notes, the comptroller was deceived, and the persons who dealt with the bank and intrusted it with their money were also deceived. However valid the defense might be if the bank were plaintiff, the defendant, who, when he gave the notes, knew exactly the purpose for which they were to be used, is estopped to say, as against the creditors, that they were other than what, on their faces, they purported to be, or that the appearance which was given to the books was not genuine."

This is only one of several situations in which a receiver, as representative of creditors, can maintain actions which the corporation as a going concern could not have maintained. Avoidance of fraudulent conveyances and of unrecorded chattel mortgages comprise the most familiar examples.

Counsel for the Surety Company insist that *Rankin, Receiver of Captiol National Bank of Guthrie,* v. *City National Bank,* 208 U. S.

541, 546, is a holding, contrary to the principle stated in the preceding paragraph, that the receiver could not recover even if the Surety Company's authorized officers had participated in Cliff's scheme. I do not so understand it. In that case the bank examiner objected to $30,000 of loans in the Guthrie Bank. To remedy this situation Billingsley, president of the Guthrie Bank, induced the City Bank to

take Billingsley's note for $30,000 and to credit the Guthrie Bank with that amount on the books of the City Bank, agreeing that the credit in the City Bank would not be subject to withdrawal and could be applied against the note at any time. The Guthrie Bank was thus enabled to enter the credit for $30,000 on its books and give to its balance sheet an appearance of prosperity that was fictitious to the extent of $30,000. Before the Guthrie Bank failed the note was charged against the credit and the transaction cancelled in accordance with the arrangement. The receiver of the Guthrie Bank sued to recover the deposit. The Supreme Court of the United States, affirming both lower courts, held that the receiver could not recover.

In the course of a six-page opinion Mr. Justice Holmes adverts to the receiver's status only once by saying (p. 546): "The receiver stands no better than the bank." This is the only reference to any possibility that the receiver might derive rights through creditors that he did not derive from the bank; and it raises the suspicion that no such contention was made. An examination of the record and briefs discloses that, in truth, this problem was not raised either as a matter

of fact by the evidence or of law by the briefs. The case arose in the Western District of Missouri. Although it is one in which proof and argument might unquestionably have been directed to establishing the receiver in a better position than that of the bank, this was not done. The record shows no evidence that the bank examiner was in fact deceived; that any creditor relied on the situation created; that any person became a creditor of the bank after the transaction referred to; or that creditors would not be paid in full. The opinion of the Circuit Court of Appeals treats the problem solely as a question whether the Guthrie Bank as a going concern could have recovered against the City Bank, decides that it could not and adds: "Neither can the receiver, who takes only the rights of the bank, now do so." *Cherry* v. *City National Bank*, 144 Fed. 587, 591. Certain events subsequent to the original transaction were relied upon by counsel for the receiver as strengthening his position (144 Fed. at 593); but nothing was said about reliance or change of position by creditors or the bank examiners. The briefs in the Supreme Court

have been examined and show no reliance upon the status of the receiver as the representative of creditors.

Other cases cited for the Surety Company rest wholly upon *Rankin* v. *City National Bank,* 208 U. S. 541, *supra,* and are distinguishable upon the same ground. *Cutler* v. *Fry,* 240 Fed. 238, is a case from the District of Kansas in which there is no evidence that creditors or the bank examiners relied upon the fictitious asset. The court relied wholly upon the Rankin case. In *Andresen* v. *Kaercher,* 38 Fed.

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(2d) 462 (8th C. C. A.), there is again no evidence of reliance by creditors or the bank examiners upon the accommodation notes; indeed, quite to the contrary, the companion case of *Kaercher* v. *Citizens' National Bank,* 57 F. (2d) 58 (8th C. C. A.), discloses that the agreement that the note-makers would be held harmless, executed by the president and cashier of the bank apparently upon full authority, was "in the bank when a receiver was appointed". 57 F. (2d) at 58. The court again relied upon the Rankin case and the group of cases in 240 Fed. involving the Yates Center National Bank, of which *Cutler* v. *Fry, supra,* is one.

If, then, the Surety Company by authorized agents had done what Cliff did, it would be liable. Does it follow that the company is liable under the circumstances actually existing in this case? Conscious deception on the part of the principal is lacking; but in place of it there is substituted (a) conscious deception on the part of the agent and (b) the fact that the principal gave to the agent for its own purposes and profit such indicia of authority to act on its behalf as enabled the agent to make the deception effective. I am convinced that the company should be equally responsible under these conditions. It provided Cliff with a power of attorney in terms much broader than he was expected to exercise, copies of the same to exhibit to third persons and to attach to documents, a corporate seal and corporate stationery. It did these things because it found that this was the convenient and profitable way in which to conduct its business. Anyone can see that such a procedure invites misuse of

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the equipment thus provided. The question is, Upon whom is to be placed the risk of loss of such misuse? It seems to me clear that the risk of loss must fall upon the principal who created it. The Surety Company is estopped to deny that the bonds and "endorsements" are the effective instruments which they appeared to be. Ragan's knowledge of the circumstances under which they were obtained does not affect the receiver as the representative of the creditors.

Direct authority in the class of cases here involved is lacking, but a fairly persuasive analogy exists. It appears to be settled that a principal is liable in tort for frauds committed by an agent on his own account, where the fraud has been made possible by the fact that the principal has put the agent in a position which facilitated the consummation of the fraud. In the typical case the agent of a telegraph company sends a message over the wires to the plaintiff; the message purports to come from some person having business relations with the plaintiff and requests that money be sent; the money is sent and the fraudulent agent in some manner intercepts it. The plaintiff is granted recovery from the telegraph company. *Bank of Palo Alto* v. *Pacific Postal Tel. Cable Co.,* 103 Fed. 841 (D. Cal.); *McCord* v. *Western Union Tel. Co.,* 39 Minn. 181. Compare *Birkett* v. *Postal Tel. Co.,* 107 App. Div. 115. For a case in which a bank officer utilized his position for consummation of a private fraud, thus rendering the bank liable, see *Steward* v. *Wright,* 147 Fed. 321 (8th C. C. A.). The Agency Restatement deals with these cases as follows:

"Sec. 261: A principal who puts an agent in a position that

enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud.

"Sec. 262: A person who otherwise would be liable to another for the misrepresentation of one acting for him, under the rule stated in sec. 261, is not relieved from liability by the fact that the apparent agent acts entirely for his own purposes, unless the other has notice of this."

The comment under Section 261 emphasizes the applicability of this rule:

> "The principal is subject to liability under the rule stated in this Section although he is entirely innocent, although he has received no benefit from the transaction, and, as stated in sec. 262, although the agent acts solely for his own purposes. Liability is based upon the fact that the agent's position facilitates the consummation of the fraud. . . ."

See also 2 Mechem, Agency (2d ed.), sec. 1984.

Counsel for the Surety Company insist that this is a case in which two innocent principals (the bank and the Surety Company) have been equally imposed upon by faithless agents, that neither is more to blame than the other, and that the loss should lie where it falls. As between the bank and the Surety Company there is force in this argument; and I have ruled, upon somewhat different grounds, that the bank would not have been able to recover. But with reference to Clark, the bank examiners and subsequent depositors, the situation is substantially different. These persons are the victims of the joint fraud of Ragan and Cliff. If the Surety Company is otherwise liable because of having placed in Cliff's hands the means of consummating

this fraud, it cannot escape liability by establishing that the deception was also the work in part of the bank through Ragan. The fact that the wrong was joint does not relieve either wrongdoer.

Ruling number 4 is not inconsistent with anything explicit or implicit in Judge Brewster's decision in *Clark* v. *Boston-Continental National Bank,* 9 F. Supp. 81. As I understand the opinion there are three distinct bases upon which Clark is held to be a general creditor:

(a) that the contract between Clark and the bank provided that in the event of liquidation he should be entitled to priority over the stockholders;

(b) that the bank had failed to carry out its obligations as to deposit of 40 percent of its stock in a voting trust and that the contract provided that in event of such failure Clark was entitled to the return of his $300,000;

(c) that, due to misrepresentations by Ragan that the notes of Cronin, Westchester Corporation and Stone were secured by surety bonds and due to other misrepresentations concerning the bank's assets, Clark was entitled to rescind.

Plainly none of these grounds of decision except the last is relevant to the present case. It seems to me implicit in Judge Brewster's decision that the bonds here in suit were not enforceable in the hands of the bank; and I have so ruled (ruling number 3). But it does not follow either from Judge Brewster's decision or from my ruling number 3 that they are not enforceable by the receiver. The statement in the summarization of facts that "by secret agreement [Ragan] had released the surety company from all obligations on the bond" (9 F.

Supp. at 83) is surely not binding in the present litigation and may indicate that Judge Brewster's opinion as to the validity of these bonds in the hands of the bank is based upon assumptions which the evidence in the present case does not justify.

5. I rule that the "releases" given by Ragan and the statement that the bonds would not be enforced do not relieve the Surety Company of liability upon the bonds to the receiver.

Ragan had no authority to do these things. *Prudential Trust Co.* v. *Moore,* 245 Mass. 311, 316. It may, for present purposes, be assumed that as against the bank (which, as I have ruled, is bound by Ragan's knowledge) the action of Ragan would prevent any obligation from arising, not because the releases were effective, but because they, with attendant circumstances, indicated that there was no intent on either side to create a binding contract. But see 5 Wigmore, Evidence, sections 2406, 2435. However, it was of the essence of the intended fraud that the bonds and "endorsements" should have the appearance of binding contracts and should be so understood by all persons to whose knowledge these documents should come. As against the creditors, unaffected by Ragan's knowledge, these secret agreements, written and oral, can have no force; and the receiver stands in their shoes.

6. I rule that the Westchester bond dated December 20, 1930,

does not secure payment of the note of $40,000 of Westchester Dis-

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count Corporation dated December 23, 1930; that there is no evidence of any breach of condition with reference to the four notes which it purports to secure, if any such exist; and that there can therefore be no recovery upon this bond.

This ruling is made as a matter of construction of the language of the Westchester bond. It is obvious from the facts found that both Cliff and Ragan intended the bond to secure the Westchester note for $40,000; but the instrument as drawn did not carry out that intention. If the prayer for general relief in the receiver's answer can be taken to encompass a prayer for reformation, I rule that, apart from other difficulties, the equitable basis for reformation is absent and that the instrument cannot be reformed. No consideration was in fact given for the instrument and neither the bank directors, the bank examiners nor creditors could have relied upon anything except the terms of the instrument which lay in the bank's vaults.

7. I rule that the new notes given by Cronin and Robinson upon and after the maturity of existing notes were "extensions" and "extensions or renewals" of the original Cronin and Robinson notes within the meaning of the Cronin and Robinson bonds and endorsements.

If the transactions which here took place upon the maturity of the original notes did not constitute renewals and extensions it would be difficult to imagine what type of transaction would come within those terms. Even if the bonds contained no guarantee of renewal notes, the bank would still be protected on the theory that the acceptance

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of a renewal note did not constitute payment of a maturing note where the maturing note was secured. Where it is to the interest of the creditor to keep the old obligation alive for the purpose of preserving his security, it will be presumed that he so intended. *Dodge* v. *Emerson,* 131 Mass. 467; *Cotton* v. *Atlas National Bank,* 145 Mass. 43, 45.

8. I rule that Stone's present obligation to the bank and the receiver is the "obligation in the sum of $52,000" referred to in the

Stone bond, and that the obligation referred to in the Stone bond has not been paid or discharged by any new notes which Stone gave to the bank as other notes matured.

Unlike the Cronin and Robinson bonds which secure certain notes and their extensions and renewals, the Stone bond secures an "obligation in the sum of $52,000". Since I have found as a fact that there was no intention to pay off this obligation by the giving of renewal notes, it follows that the obligation still continues and is secured by the bond.

NOTICE OF DEFAULT: WHETHER A CONDITION PRECEDENT TO RECOVERY.

9. I rule that the giving of notice of default within ten days was not a condition precedent to recovery under any of these bonds and that, there being no evidence of damage to the company from such delay as may have existed, the company has no defense based upon the requirement of notice.

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Each of the four bonds contains a provision for the giving of notice of default within ten days to the home office of the Surety Company. The question is whether this provision is a condition precedent to the Surety Company's liability or is merely a promise. If it is a condition precedent the bank cannot recover without proving that it has been complied with; if it is a promise, its breach affords no defense to the Surety Company in the absence of evidence of substantial damage—and no such evidence has been offered.

The language of the bonds differs with reference to the giving of notice:

(a) Westchester bond: "In the event of default on the part of the principal on any note, the obligee shall notify the home office of the Surety Company . . . within 10 days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, . . . said payment to be made by the Surety Company within thirty days after maturity of the final note."

(b) Cronin and Robinson bonds: "In the event of default on

the part of the principal, the obligee shall notify the home office of such surety . . . within 10 days, by registered mail, of such default, and the Surety Company shall within 30 days pay any liability hereunder."

(c) Stone bond: "In the event of default on the part of the principal . . . the obligee shall notify the home office of the Surety Company . . . within ten days by registered mail of such default and the Surety Company shall pay any liability hereunder, . . . said payment to be made by the Surety Company within thirty days after the receipt by the Surety Company of the notice of default."

The Cronin and Westchester bonds were extended by "endorsements" which provided that:

"In event of default on the part of the principal . . . the obligee

. . . shall notify the home office of this company . . . within five days by registered mail, of such default."

Common forms of insurance policies have been held to make notice a condition precedent to the bringing of an action; but the language of such policies differs substantially from that of the instruments here in suit. Thus in *Fitchburg Savings Bank* v. *Mass. Bonding & Ins. Co.*, 274 Mass. 135, "affirmative proof of loss with full particulars" was required within three months and it was provided that: "Legal proceedings shall not be brought prior to the expiration of three months from the furnishing of such proof." No proof of loss "with full particulars" was ever given. The court held that the giving of such proof was a condition precedent to recovery. Again in *McCord* v. *Masonic Casualty Co.*, 201 Mass. 473, the policy provided that: "Unless notice shall be given within two weeks, all claim under this certificate shall be forfeited." In *McCarthy* v. *Rendle*, 230 Mass. 35, the policy provided that: "This agreement is subject to the following conditions: . . . D—The assured upon the occurrence of an accident shall give immediate written notice thereof to the Company." In *Smith* v. *Haverhill Mutual Fire Ins. Co.*, 1 Allen, 297, the company's by-laws which were held to be incorporated into

the policy provided that: "Unless such proofs . . . shall be produced within said thirty days, . . . the losses shall not be payable." In *Eastern R. R. Co.* v. *Relief Fire Ins. Co.*, 98 Mass. 420, the company promised to pay the loss "within sixty days after due notice and

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proof thereof made by the insured in conformity to the conditions annexed to this policy", one of which "conditions of insurance" required notice forthwith and proof of loss within sixty days.

These are the authorities relied upon by the Surety Company in requesting a ruling that the giving of notice within the specified time was a condition precedent to recovery upon these bonds. The instruments in those cases seem to me distinguishable from those in the case at bar in their uniform insistence upon satisfaction of the requirement of notice as a prerequisite to the bringing of suit. There are numerous cases in which it is pointed out that a requirement of notice is merely promissory unless it is expressly made a condition or ground of forfeiture. *New Amsterdam Casualty Co.* v. *United States Shipping Board*, 16 F. (2d) 847 (4th C. C. A.); *Coventry Mutual Live Stock Ins. Assn.* v. *Evans*, 102 Pa. St. 281; *Mason* v. *St. Paul Fire & Marine Ins. Co.*, 82 Minn. 336, 338; *Kahnweiler* v. *Phoenix Ins. Co.*, 57 Fed. 562 (*D. Kan.*); *Vangindertaelen* v. *Phoenix Ins. Co.*, 82 Wis. 112. See also 2 Williston, Contracts, sec. 665; 5 Joyce, Insurance (2d ed.), sec. 3282.

I am unable to find in these four bonds language which can fairly be construed as creating a condition. The Westchester bond is the most favorable to the bank, since there is no connection at all between the giving of notice and the payment by the company; payment is due "thirty days after maturity of the final note". The Cronin and Robinson bonds are somewhat ambiguous. The company is obligated to pay "within 30 days", it being somewhat conjectural whether that period is to be computed from the date of default (as

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in the Westchester bond) or the date of notice (as in the Stone bond). Probably the latter construction is preferable; but no such ambiguous phrase should be treated as raising a condition whose slightest breach would invalidate the obligation. The Stone bond is

the most favorable to the company. It provides that payment is to be made within thirty days of the receipt "of the notice of default". Even this, however, is insufficient to cause the requirement of notice to be treated as a condition. A delay in giving notice would operate to postpone the maturity of the company's obligation until thirty days after the notice was received, but it would not discharge the obligation in the absence of proof that the delay had been substantially harmful to the company. See *Vangindertaelen* v. *Phoenix Ins. Co.*, 82 Wis. 112, 118. Nothing in the wording of the "endorsements" to the Cronin and Westchester bonds has any tendency to strengthen the inference that notice was a condition precedent to recovery.

NOTICE OF DEFAULT: WHETHER IT WAS GIVEN AS REQUIRED.

I have been requested to make findings and rulings as to whether notice of default was given within the meaning of the bonds. Once again, the bonds must be treated separately because of differences in their terms.

a. The Cronin Bond.

10. I find and rule that the bank gave notice of default to the Surety Company as required by the Cronin bond.

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This bond was dated September 6, 1930, and was given with reference to a note of Cronin maturing September 22, 1930. For present purposes the significant language of the bond is the following:

> "The condition of this obligation is such that if Arthur D. Cronin shall, within six months from date hereof, make . . . full and true payment of note, . . . or of any extension thereof, in whole or in part, then this obligation shall be void. . . . In the event of default on the part of the principal, the obligee shall notify the Home office of such Surety . . . within ten days, by registered mail, of such default, and the Surety Company shall within thirty days pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default six months from date hereof . . ."

The syntax of these sentences leaves much to be desired but does not entirely preclude analysis. What is the "default" of which the Surety is entitled to notice? Is it the failure to pay the existing note at its maturity two weeks and two days after the bond was written? Or is it the failure to meet this obligation "within six months"? Plainly the latter. The words "default six months from date hereof" in the last line of the quoted excerpt appear to define "default" as it appears in the earlier portion of the bond. Any other construction would cause the provisions for notice and payment to accelerate substantially the obligation of the bond: for if Cronin failed to pay on September 22, 1930, and notice of default were then given, payment by the Surety within 30 days of the notice is required, although the condition of the bond is only that Cronin shall pay within six months

from September 6, 1930. The instrument anticipates that Cronin will not pay on September 22, and that the note may be renewed, extended, or allowed to remain overdue. *Lascelles* v. *Clark,* 204 Mass. 362, 373, and *Chace* v. *Brooks,* 5 Cush. 43, 50, cited by counsel for the Surety Company deal with situations in which the surety was bound only upon the original obligation and not upon extensions or renewals, and are inapplicable here.

Cliff executed three "endorsements" successively extending the Cronin bond. They are identical in form. Treated as one extension, they provided that:

> "Note Guarantee Bond . . . binding this Company to an obligation in the amount of $20,000. in connection with a note of Arthur D. Cronin of Boston, given to the said Continental National Bank of Boston and maturing on March 22, 1931, is hereby extended in an amount not to exceed $14,000 or such portion thereof, as may remain unpaid on date of November 3, 1932.
>
> "In event of default on the part of the Principal, . . . the obligee . . . shall notify the Home Office of this Company . . . within five days by registered mail of such default."

I rule that these are amendments to the original contract of suretyship and hence new contracts executed by Cliff and that they fall

within the terms of his authority as stated in his power of attorney. I further rule that the word "default" in the suretyship contract as thus amended means the failure of Cronin to pay, on November 3, 1932, the full amount due upon the original note of $20,000 or any renewal or extension thereof.

It is undisputed that the company was notified within five days of November 3, 1932, by registered mail that Cronin had defaulted in payment in the amount of $14,000 and interest. I rule that this com-

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plied with the requirement of notice. It is equally undisputed that when Cronin's original note fell due on September 22, 1930, he gave a new note for $18,500 maturing October 22, 1930, paid the bank $1,500 in cash in addition to the discount on the new note, and received back the old note stamped "Cancelled"; that this process of giving a new note and receiving back the old note was repeated several times; that sometimes a cash payment was made in addition to the discount and that sometimes it was not; that sometimes there was an interval between the maturity of the old note and the making of the new, the longest such interval being sixty-three days; that the last note given matured on January 4, 1932; and that no notice of default was sent to the Surety Company until November 4, 1932. But I rule that these facts do not show non-compliance with the requirement of notice of default in the bond as amended by the endorsements.

b. The Westchester Bond.

I have already ruled that the Westchester bond and "endorsements" cannot be construed as a guaranty of the only note the Westchester Discount Corporation made in favor of the bank, and that this bond cannot be the basis of any liability of the Surety Company to the receiver. If, however, it should finally be determined that this bond and "endorsements" did guarantee the Westchester note for $40,000:

11. I find and rule that the notice of default required by the bond

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as amended by the endorsements was given.

The original Westchester bond did not cover extensions, and required notice within ten days "of default on the part of the principal of any note", the notes having previously been described as maturing on January 20, February 20, March 20 and April 20, 1931. No such notice was given within ten days of default on any of the notes. But I rule that the two endorsements constituted new contracts. Treated together, they "extended the obligation in the amount of $40,000" in connection with a series of notes of Westchester Discount Corporation for a period of eight months "in an amount not to exceed $40,000 or such portion thereof as may remain unpaid on date of December 20th, 1931". It was provided that: "In event of default on the part of the principal . . . the obligee . . . shall notify the home office of this company . . . within five days by registered mail, of such default."

The word "default" in this clause must be read in the light of the fact that at least the second of these "endorsements" was executed at a time when the four notes referred to in the bond and the Westchester note of $40,000 were overdue. Plainly the "default" cannot be a failure to pay at maturity, for this had already occurred. It must mean a failure of the Westchester Discount Corporation to pay off the obligation on or before December 20, 1931. It is undisputed that notice was given within five days by registered mail to the home office of the Surety Company that there was a "default of the Westchester Discount Corporation of Mt. Vernon, New York, to pay their obliga-

tions bonded by your company to the Boston-Continental National Bank in the amount of not to exceed $40,000". I rule that, if the bond and endorsements are construed to guarantee the Westchester note, this notice complied with the requirements of the bond and endorsements.

c. The Stone Bond.

12. I find and rule that the Bank did not give notice of default within the time specified in the Stone bond.

This bond, which was not extended, was conditioned upon payment by Joseph Stone of an obligation of $52,000, within one year

from the date of the bond, which was June 2, 1931. Notice within ten days was required "in the event of default on the part of the principal, one year from this date". Stone did not pay on or before June 2, 1932. No notice was given to the company until on or about June 30, 1932. At that time a notice was given which complied with the requirements of the bond except as to time.

d. The Robinson Bond.

13. I find and rule that the bank did not give notice of default within the time specified in the Robinson bond.

This bond was dated July 8, 1931, and was given with reference to a note of Robinson maturing November 8, 1931. For present purposes the significant language is the following:

> "The condition of this obligation is such that if Gordon A.
>
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>
> Robinson shall, within four months from date hereof, make . . . payment of note . . . maturing November 8th, 1931, or of any extension thereof, in whole or in part, then this obligation shall be void. . . ."

Pausing at this point, one must conclude that the words "within four months from date hereof" can only refer to payment of the original note, not to payment of any extension. Since the original note did not mature until four months from the date of the bond, any extension must necessarily mature at a later date. Hence the condition of the bond is satisfied if Robinson (a) pays the original note within four months, or (b) pays any extension at maturity. The bond continues:

> "In the event of default on the part of the principal, the obligee shall notify the home office of such surety . . . within ten days, by registered mail, of such default and the Surety Company shall, within 30 days, pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default, four months from date hereof . . . ; the liability of the surety with respect to any such extension or renewal, in no event to extend beyond date of July 8, 1932."

This language in its entirety does, in my opinion, completely defy interpretation. The difficulty centers upon the words "four months from date hereof". These words are plain nonsense when read in the light of provisions in the succeeding clause and other portions of the instrument which make the bond applicable to extensions and renewals of the original note. Since they are irreconcilable with the balance of the instrument, I rule that they are repugnant and are to be disregarded. The question then is, What is the "default" referred

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to? As in the case of the Cronin bond, it was contemplated that the note might not be paid in cash at maturity but that a new note would be given. But the terms of the instrument do not admit of restricting the meaning of "default" to a failure to pay the balance due on July 8, 1932. Nothing less than this will avail the bank.

Robinson's original note was not paid in cash when it matured on November 8, 1931. At or about that time $1,000 was paid on account, and on November 12, 1931, Robinson gave a new note for $19,000, maturing December 9. This note was not paid and no new note was given. I rule that a "default" occurred, within the meaning of the Robinson bond, not later than December 9, 1931. On July 10, 1932, the bank gave notice to the Surety Company which complied with the requirements of the Robinson bond except as to the time of giving. But I rule that such notice was not given within the time specified in the bond.

The bank has not contended that notice of default was waived by the Surety Company as to any of these bonds, and I find that no waiver occurred.

ELECTION OF REMEDY—FINDINGS OF FACT.

In its amended bills in the equity suits and amended answers in the law actions the Surety Company contends that it is not liable under any of these bonds for the reason that the bank was the holder of certain "Bankers' Blanket Bonds" issued by the Fidelity & Deposit Company of Maryland (hereafter called the F. & D.) insuring

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the bank against loss by the fraud of its officers; that the receiver

filed with the F. & D. notice of claim and proof of claim in which it sought to recover under the Blanket Bonds for the Cronin, Westchester, Stone and Robinson losses on the ground that the Standard Surety bonds were fraudulent and uncollectible; that suit was brought in accordance with said notice and proof of claim and was prosecuted to judgment; that this was an election to treat the Standard Surety bonds as invalid; and that this election prevents the receiver from here taking the inconsistent position that the bonds are valid and thus absolves the Surety Company from liability.

The chronology of revelant events relating to this defense is as follows:

Dec. 17, 1931. The bank closed its doors.

Dec. 22, 1931. Receiver appointed.

Feb. 23, 1932. Surety Company brought in the state courts the four bills in equity now being tried, seeking cancellation of the bonds.

April 28, 1932. Receiver's notice of loss to F. & D.

June 2, 1932. Receiver's proof of loss filed.

June 28, 1932. Receiver's law action vs. Standard Surety Company on Westchester bond entered. (Writ dated June 8, 1932.)

Sept. 13, 1932. Receiver's law actions vs. Surety Company on Stone and Robinson bonds entered. (Writs dated Aug. 11, 1932.)

March 21, 1933. Receiver's law action vs. F. & D. entered. (Writ dated Dec. 21, 1932.)

April 14, 1933. Receiver's answers filed to four bills in equity after removal to federal court.

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June 23, 1933. Receiver filed bill of particulars in action vs. F. & D.

June 26, 1934. Receiver filed notice to admit facts in action vs. F. & D.

July 17, 1934. Receiver filed further bill of particulars in action vs. F. & D.

July–Sept. Hearings before auditor in action vs. F. & D.
Oct. 10, 1934. Agreement for judgment filed in action vs. F. & D. Judgment entered.

The Blanket Bonds upon which the actions against the F. & D. were based appear as Exhibits 1-a and 1-b to the notice to admit facts filed June 26, 1934, in case No. 5498 Law in this court. They are herein incorporated by reference if their precise terms are material. These bonds undertook to insure the bank against, *inter alia* loss through dishonest and criminal acts of employees, the amount of coverage being limited to $50,000 and $150,000 respectively. The limitations and conditions to the insurer's liability are, as would be expected, numerous and complicated.

On April 28, 1932, the receiver sent to the F. & D. a letter containing, so far as here material, the following statements:

"Supplementing my letter dated April 8th, you will please find below a resume setting forth specific irregular transactions which would appear to result in a total loss to my trust aggregating approximately $285,000.

. . . .

2. $40,000. fraudulent bond of the Standard Surety & Casualty Company of New York purported to be issued to cover loan of this bank to the Westchester Discount Corporation of which Joseph Stone was Treasurer, said loan dated December 30, 1930, in the principal amount of $40,000, said loan due and

payable April 23, 1931. As a result of fraudulent bond in the amount above stated, my trust stands to lose $40,000. and interest.

"The Westchester Discount Corporation of Mt. Vernon, New York, is now in bankruptcy.

. . . .

4. Fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $52,000. purported to be issued on June 2, 1931, as security on loan to Joseph Stone, personally, in said amount. This bond was invalid and resulted

from the fraudulent conspiracy of T. M. Ragan, President, with Joseph Stone and Percy G. Cliff, the attorney in fact of Standard Surety & Casualty Company of New York. The amount of the loan is uncollectable, and my trust stands to lose the full amount of $52,000. and interest.

5. Similar fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $20,000. purported to be executed to secure loan on July 8, 1931 to Gordon A. Robinson, doing business as the Robinson Engineering Company. The bond was known to be invalid to T. M. Ragan, President, Percy G. Cliff and Gordon A. Robinson, and as a result of the fraud my trust stands to lose $15,000. and interest.

"6. Fraudulent bond purported to be executed by the Standard Surety & Casualty Company of New York in the amount of $20,000. as security on loan to Arthur D. Cronin made on August 23, 1930. The fraudulent issuance of this bond was made under the same circumstances as the other bonds except in this case Arthur D. Cronin participated. The amount of the loan is uncollectable and my trust stands to lose the amount of $20,000. and interest. . . .

"If further information is desired kindly let me know.

"These claims are made without prejudice to further claims due to other irregularities which may lead to the filing of proper claims under the bonds written by your company."

The receiver subsequently sent to the F. & D. a proof of claim under oath dated June 2, 1932, which, so far as here material, contained the following:

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"County of Suffolk, ss.

"I, John B. Cunningham, Receiver of the Boston-Continental National Bank make the following statement: . . .

"2. $40,000. fraudulent bond of the Standard Surety & Casualty Company of New York, purported to be issued to cover loan of the Boston-Continental National Bank to the Westchester Discount Corporation of which Joseph Stone was Treasurer, said loan dated December 30, 1930, in the principal amount

of $40,000, due and payable April 23, 1931. As a result of fraudulent bond my trust stands to lose $40,000, and interest. The Westchester Discount Corporation of Mt. Vernon, New York, is now in bankruptcy.

$40,000.00

"4. Fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $52,000, purported to be issued on June 2, 1931, as security on loan of Joseph Stone, personally in said amount. This bond was invalid and resulted from the fraudulent conspiracy of T. M. Ragan, President, with Joseph Stone and Percy G. Cliff, the attorney in fact of Standard Surety & Casualty Company of New York. The amount of loan is uncollectable and my trust stands to lose $52,000, and interest.

$52,000.00

"5. Similar fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $20,000, purported to be executed to secure loan of July 8, 1931, to Gordon A. Robinson, doing business as the Robinson Engineering Company. The bond was known to be invalid to T. M. Ragan, President, Percy G. Cliff, and Gordon A. Robinson. As a result of the fraud my trust stands to lose $15,000, and interest.

$15,000.00

"6. Fraudulent bond purported to be executed by the Standard Surety & Casualty Company of New York, in the amount of $20,000, as security on loan to Arthur D. Cronin, made on August 23, 1930, and renewed from time to time. The fraudulent issuance of this bond was made under the same circum-

stances as the other bonds except in this case Arthur D. Cronin participated. The amount of this loan is uncollectable, and my trust stands to lose the amount of $20,000, and interest.

$20,000.00

Total $501,385.24

The receiver's amended declaration in the suit against the F. & D. alleged that the Blanket Bonds had been written covering losses by dishonest and criminal acts and that there had been losses as a result of such acts to an amount greater than the limits of the bonds. Bills of particulars filed by the receiver showed that there had been 26 alleged losses, of which those on the transactions involved in the present litigation were four. These four were set forth in the particulars as follows:

Name	Date Loss Suffered.	Date Loss and Dishonesty Discovered.	Amount of Loss.	Date of Notice to Defendant.	Criminal Dishone Act.
Westchester Discount Corporation	Dec. 23/30	Shortly before Mar. 4/32	$39,950, with interest	Mar. 4/32 Apr. 28/32	Loan w intent t defraud insured
Joseph Stone	Apr. 26/30 Mar. 24/31	Shortly before Mar. 4/32	$27,532.37 with interest	Mar. 4/32 Apr. 28/32	"
Gordon A. Robinson	July 8/31	Shortly before Mar. 4/32	$14,000.00 with interest	Mar. 4/32 Apr. 28/32	"
Arthur D. Cronin	Aug. 23/30	Shortly before Mar. 4/32	$14,000.00 with interest	Mar. 4/28 Apr. 28/32	"

There was appended to the bill of particulars a note as follows:

"NOTE 3. In column No. 7 the Plaintiff has attempted to give some of the criminal and/or dishonest acts committed with each loan, but as what constitutes a criminal or dishonest act is a question of law, the plaintiff does not intend to be limited by the characterizations given."

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The receiver, on June 26, 1934, filed a "plaintiff's notice to admit facts", in which the receiver called upon the F. & D. to acknowledge receipt of the proof of claim dated June 2d (which was there set forth in full and contained the paragraphs numbered 2, 4, 5, and 6 above described) and proof of claim dated November 3, 1932, containing the same paragraphs and terminating with an affidavit of the receiver in which it stated:

" . . . that there are no counter claims, of offsets of any nature whatsoever, other than those stated in the above statement, due to said Boston-Continental National Bank."

The body of that proof of claim shows no offset by way of claim against the Surety Company.

The case went to trial before an auditor and was heard for twenty days. Counsel for the receiver called as witnesses Cliff, Cronin and a vice-president of the Surety Company to establish the dishonest manner in which the bonds were written and that the Surety Company had no knowledge of their existence. He introduced the proof of claim of June 2, 1932. During the course of the trial counsel for the receiver in colloquies with the auditor contended both that the loans were fraudulent and that the bonds were fraudulent and did not abandon either position. In the hearings before the auditor many other matters besides those affecting these bonds were dealt with.

Between October 2 and October 10, 1934, conferences were had between counsel for the receiver and counsel for the F. & D. relating to settlement. A settlement of $100,000 was finally arrived at. Counsel for the F. & D. was induced to concede probable liability on

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items totalling $105,000; and counsel for the receiver agreed to accept $100,000. The items of probable liability did not include the Cronin, Westchester, Stone and Robinson transactions or any of them. But it was agreed that the liability of the F. & D., if any, with reference to those transactions should be released. I infer and find that the settlement of $100,000 was given in part upon consideration of release of the F. & D. from claims concerning these four transactions. I also infer and find that part of the pressure which induced counsel for the F. & D. to concede probable liability on $105,000 of claims and settle for $100,000 was the threat of liability with reference to the four transactions here in litigation. I therefore find that the receiver has obtained an advantage against the F. & D. by pressing against that company a claim that it was liable to some extent with reference to these four transactions.

A release was given to the F. & D. and judgment entered against the F. & D. in accordance with the agreement. At the same time there was executed an agreement of compromise declaring that the F. & D. acquired no rights against the Surety Company under these bonds, that the receiver reserved to himself all such rights, and that

no part of the $100,000 was paid to the receiver for the acquisition by the F. & D. of any rights against the Surety Company.

The Surety Company was a re-insurer of the F. & D. with reference to its obligations under the Blanket Bonds. Counsel for the receiver knew of this before the settlement above referred to.

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No evidence was introduced or offered before me sufficient to indicate whether the receiver could have recovered under the Blanket Bonds for the losses suffered in the four transactions here in suit. I therefore find that it has not been established that the F. & D. was liable to the receiver with reference to these transactions.

ELECTION OF REMEDY—RULINGS OF LAW.

14. I rule that there has been no election of remedy which is a defense to the receiver's claims in the present litigation.

It is ordinarily no defense to an action that the plaintiff in other litigation has taken an inconsistent position. If A is damaged by a libellous anonymous letter, he may sue B on the theory that B wrote it and, when the jury has found against him, he may sue C on the theory that C wrote it. A binding election of remedy is made (at least in contract cases) only in those situations where a wronged party has the option to affirm or disaffirm a transaction or to accept or repudiate a title, and definitively exercises the option. The cases cited by counsel for both parties establish this principle. See for example *United States* v. *Oregon Lumber Co.*, 260 U. S. 290; *Frisch* v. *Wells*, 200 Mass. 429; *Scarf* v. *Jardine*, 7 A. C. 345; *Washburn* v. *Great Western Ins. Co.*, 114 Mass. 175. Only rarely is a right of action against one person lost by election to sue another; the usual case is the assertion of two inconsistent claims against the same person.

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The receiver never disaffirmed these bonds or any obligation of the Surety Company which they may create. He never indicated an intention not to enforce any rights he might have under them. The furthest he went was to make a pessimistic prophecy as to his chances of collection. He did not know whether he could recover upon them—and he will not know until this case has been passed upon in

the highest court to which it can be taken. His conduct amounted to nothing more than bringing suit against both companies potentially liable and, necessarily in ignorance of the ultimate result, making the allegations against each which he believed to be necessary for recovery. By notices and suits he consistently declared his intention of holding both the F. & D. and the Surety Company so far as the contracts permitted. Under the Blanket Bonds, notice and proof of loss had to be promptly filed and suits against the F. & D. had to be commenced within 1 year from discovery of the loss; it was obviously impossible to obtain an adjudication of rights against the Surety Company before that time. To say that the receiver was compelled to guess correctly in advance the outcome of the present litigation is to place upon him a burden for which I am unable to find any authority.

The remedy of the receiver against the F. & D. was not inconsistent with his remedy against the Surety Company but quite independent of it. Under the decision in *Fitchburg Savings Bank* v. *Mass. Bonding and Insurance Co.*, 274 Mass. 135, 149, it appears that the F. & D. was in the position of a sub-surety with reference to these

notes and bonds. It was not requisite to recovery against the F. & D. that the receiver should first exhaust his remedy against the Surety Company. If complete recovery had been had against the F. & D. with reference to these notes and bonds, the F. & D. would have been entitled to be subrogated to the rights of the receiver against the Surety Company under clauses 7 and 12 respectively of the F. & D. Blanket Bonds. As it turned out, complete recovery upon the Blanket Bonds was not had and, to whatever extent the F. & D. was entitled to be subrogated to the receiver's rights, it re-assigned those rights to the receiver in the compromise agreement.

In the notices and proofs of loss the receiver alleged that these bonds were fraudulent, invalid and uncollectable. These were conclusions of law, uttered for the sole purpose of giving to the F. & D. notice of the claims against it with sufficient specification to allow it to investigate the circumstances and defend against the claims. These conclusions did not indicate an intention to disaffirm the bonds

(which would have been an equitable tort to the F. & D.'s right of subrogation). The notice and proof of claim were not public records; they were not addressed to the Surety Company; the Surety Company has not been harmed by them and has not changed its position in reliance upon them. No element of equitable estoppel exists.

It has been urged that it is important that the Surety Company was a re-insurer of the F. & D.'s obligations and that counsel for the receiver knew this fact. I rule that this has no materiality.

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RULINGS ON EVIDENCE.

The bonds and "endorsements", most of the testimony of Cliff and Cronin and some bank records were introduced without contest, but, with negligible exceptions, all other testimony introduced was objected to by one party or the other and exception taken. All of these objections were directed to the materiality of the testimony offered. Pursuant to the rule of conduct prescribed in *Kansas Loan & Trust Co.* v. *Electric Ry. etc. Co.*, 108 Fed. 702, I admitted all testimony which was to my mind conceivably relevant and found the facts based upon such testimony whether or not these facts seemed to me material. The questions raised by the objections which the parties made are equally open to them in arguing matters of substance. It may safely be said that no possible objections on grounds of materiality have been waived.

Following the submission of a draft report counsel for the Surety Company suggested that the second sentence in the above paragraph should commence with the word "Most" instead of the word "All", and added: "We request that all of the testimony objected to and admitted without that limitation be reported with the objections thereto." No such evidence or objection was pointed out, and I therefore decline to follow the suggestion.

At the request of counsel for the Surety Company I state that all testimony as to the bank examiner's reports was admitted subject to the objection and exception of said counsel. The objection was on the ground of materiality and is quoted in Exhibit H, paragraph 2,

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hereof. The reports themselves were not offered in evidence and their full contents do not appear. I am requested to report all testimony relating to these reports but I decline to do so.

PROCEEDINGS UPON DRAFT REPORT.

I submitted a draft report to counsel and received written suggestions.

Counsel for the Surety Company requested a report of all the testimony. This I decline to do.

Counsel for the Surety Company requested a report of the evidence on certain questions of fact as to which the contention was made that there is no sufficient evidence to support the findings. This, it seems to me, should be done. Evidence on these points is presented in Exhibit H hereto. The testimony has been reduced to narrative form where accurate paraphrase is possible; but with reference to the most serious and far-reaching of these objections (the finding that Clark relied upon the bonds) no accurate paraphrase would appreciably shorten the testimony and it has therefore been given in interrogatory form.

Counsel for the Surety Company objected to the giving of reasons for the rulings of law and requested that all such reasons be stricken out. It is my understanding that the "conclusions of law", which I am to report under the order of reference, include the basis in authority and reason of the rulings given. I therefore decline to follow this request.

Counsel for the receiver requested findings as to an incident which I believed and still believe to be immaterial. However, I make the findings in Exhibit J hereto and incorporate the same herein by reference.

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CONCLUSIONS AND RECOMMENDATIONS FOR JUDGMENT AND DECREE.

I conclude that all of these bonds are binding obligations of the Surety Company and that there is therefore no ground upon which they can be cancelled. I conclude that the Surety Company is in-

debted to the receiver in the following amounts on the following bonds:

Cronin bond: $14,000 with interest at 6 percent from December 6, 1932, to date of decree.

Westchester bond: Nothing.

Stone bond: $52,000 with interest at 6 percent from July 30, 1932, to date of decree.

Robinson bond: $14,403.52 with interest at 6 percent from August 10, 1932, to date of decree.

As to the prayers of the Surety Company, all bills in equity should be dismissed. As to the prayers of the receiver, the Westchester case (Eq. No. 3851) should be dismissed, but in the other three cases a decree should be entered ordering the company to pay to the receiver the amounts specified.

In the law cases judgment should be entered for the defendant in the Westchester case (No. 5225 Law) and for the plaintiff in the amounts specified in the Robinson case (No. 5316) and the Stone case (No. 5317).. As previously noted, there is no law case with reference to the Cronin transaction.

Respectfully submitted,

R. BARTON LEACH,

Master and Auditor.

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EXHIBITS.

EXHIBIT A.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

Home Office 80 John Street, New York, N. Y.

No. $20,000.00

Know all Men by these Presents, That we, Arthur D. Cronin of Boston, in the County of Suffolk and the Commonwealth of Massachusetts, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and having an usual place of business in Boston, as Surety, are held and firmly bound and obligated unto the

Continental National Bank of Boston in the County of Suffolk, in the full and just sum of twenty thousand dollars ($20,000.), to be paid to said Continental National Bank of Boston, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if Arthur D. Cronin shall, within six months from date hereof, make to the Continental National Bank of Boston, full and true payment of note in the amount of twenty thousand dollars ($20,000.), maturing September twenty-second, nineteen hundred and thirty, or of any extension thereof, in whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect.,

In the event of default on the part of the principal, the obligee shall notify the Home Office of such Surety at 80 John Street, New York City, New York, within ten days (10), by registered mail, of such default, and the Surety Company shall within thirty days (30) pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default six months from date hereof and in no event exceeding twenty thousand dollars, ($20,000.).

Witness our hands and seals, and dated this 6th day of September A. D. 1930.

ARTHUR D. CRONIN [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

[CORPORATE SEAL]

by Percy G. Cliff, Attorney-in-fact

EXHIBIT B.

Standard Surety & Casualty Company of New York

Home Office 80 John Street, New York

No. 1038

GENERAL POWER OF ATTORNEY

Know all Men by these Presents: That the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and having its executive offices in the City of New York, New York, does hereby make,

constitute and appoint Percy G. Cliff or R. L. Carven, Boston, Massachusetts, its true and lawful attorney-in-fact with full power and authority at to make, execute and deliver, with or without the impression of its corporate seal, for and on its behalf as surety, any and all bonds, recognizances, obligations, stipulations, undertakings, or anything in the nature of any of them, which are or may be allowed, required or permitted by law, statute, rule, regulation, contract or otherwise; all as described and authorized in the resolution of the Board of Directors of the Standard Surety & Casualty Company of New York, hereinafter set out, but reserving to itself full power of substitution and revocation,

and the Standard Surety & Casualty Company of New York hereby ratifies and confirms all that its said attorney-in-fact may lawfully do by virtue of these presents, as fully and amply, to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the Company, at the office of the Company, in New York, New York, in their own proper persons.

This power of attorney is made and executed in accordance with and by the authority of the following Resolution adopted by the Board of Directors of the Standard Surety & Casualty Company of New York at a meeting duly called and held on the 14th day of December, 1928.

Resolved, that the president or a vice-president shall have power and authority to appoint assistant secretaries, resident vice-presidents, resident secretaries, resident assistant secretaries and attorneys-in-fact, and to give such appointees full power and authority to sign and to seal with the company's seal, where required, all policies, bonds, recognizances, stipulations and all underwriting undertakings, and may at any time remove any such appointees and revoke the authority given them.

Resolved, that attorneys-in-fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any

of the By-Laws of the Company, and to any Resolution adopted by its Board of Directors.

In witness whereof, the Standard Surety & Casualty Company of New York has caused these presents to be signed and its corporate seal to be affixed by its proper officers, thereunto duly authorized, at the City of New York, New York, this 5th day of October, 1929.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

[CORPORATE SEAL]

By: John R. English, Vice-President

Attest: Edward J. Halligan, Assistant Secretary

State of New York

City and County of New York, ss.

On this 5th day of October, in the year 1929, before me personally came John R. English to me known, who, being by me duly sworn, did depose and say: That he resides in State of New Jersey; that he is Vice-President of the Standard Surety Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the Seal affixed to said instrument is such corporate seal; that it was affixed to such instrument by and under authority conferred by the Board of Directors of said corporation; and that he signed his name thereto by like authority.

F. H. COLQUHOUN,

[SEAL] Notary Public

State of New York

City and County of New York, ss.

I, Edward J. Halligan, Assistant Secretary of the Standard Surety & Casualty Company of New York hereby certify that the foregoing is a true and correct copy of a Power of Attorney, issued by the Standard Surety & Casualty Company of New York and is in full force and effect.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary and affixed the corporate seal of the Standard Surety & Casualty Company of New York, this 10th day of June, 1930.

EDWARD J. HALLIGAN,

[CORPORATE SEAL] Assistant Secretary.

EXHIBIT C.

ENDORSEMENT

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $20,000. in connection with a note of Arthur D. Cronin of Boston, given to the said Continental National Bank of Boston and maturing on March 22nd, 1931 and subsequently extended to November 3rd, 1931, is hereby further extended in an amount not to exceed $14,000.00 or such portion thereof, as may remain unpaid on date of November 3rd, 1932.

In event of default on the part of the Principal, said Arthur D. Cronin of Boston, the obligee the said Continental National Bank of Boston shall notify the Home Office of this Company at #80 John Street, New York City within five days by registered mail of such default.

Witness our hand, this second day of November, nineteen hundred thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

[CORPORATE SEAL] By Percy G. Cliff, Attorney-in-fact

EXHIBIT D.

No. $40,000.00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

SCHEDULE OF NOTES.

Date	Amount	Maturity
Dec. 20, 1930	$10,000.00	January 20, 1931
Dec. 20, 1930	10,000.00	February 20, 1931
Dec. 20, 1930	10,000.00	March 20, 1931
Dec. 20, 1930	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note, the obligee shall notify the Home Office of the Surety Company at 80 John Street, New York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December, A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION

By Joseph Stone, Treas. [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

[CORPORATE SEAL] By Percy G. Cliff, Attorney-in-fact

EXHIBIT E.

Frank G. Morris, President Standard Surety & Casualty Company of New York

Home Office: 80 John Street, New York

Boston Brank Office: 33 Broad Street

Percy G. Cliff, Manager

Telephone Hancock 8811 Boston, Mass.

ENDORSEMENT

For value received, Note Guarantee Bond issued in favor of the

Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931 and subsequently extended for a period of two months until June 20th, 1931, is now further extended for a period of six months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of December 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail, of such default.

Witness our hand this twentieth day of June, A. D. Nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff, Attorney-in-fact

EXHIBIT F.

No. 9485–31 $52,000.00

Know all Men by these Presents, That we, Joseph Stone of Brockton, Massachusetts, as Principal, and the Standard Surety & Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking Corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of fifty-two thousand dollars ($52,000.00), to be paid to said Boston Continental National Bank as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Joseph Stone shall, within one year from this date, make to the Boston Con-

tinental National Bank, full and true payment of an obligation in the sum of fifty-two thousand dollars ($52,000.00), then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, one year from this date, the obligee shall notify the Home Office of the said Surety Company at 80 John Street, New York City, New York, within ten days by registered mail of such default and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid obligation of fifty-two thousand dollars ($52,000.-00), said payment to be made by the Surety Company within thirty days after the receipt by the Surety Company of the notice of default.

Witness our hands and seals, and dated this 2nd day of June, A. D. 1931.

JOSEPH STONE [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

[CORPORATE SEAL] By Percy G. Cliff, Attorney-in-fact

EXHIBIT G.

No. 12420–31 $20,000.00

Know all Men by these Presents, That we, Gordon A. Robinson of Boston in the County of Suffolk and the Commonwealth of Massachusetts, doing business as Robinson Engineering Company, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking Corporation duly organized under the laws of the United States of America and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of twenty thousand dollars ($20,000.00), to be paid to said Boston Continental National Bank as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if Gordon A. Robinson shall, within four months from date hereof, make to the Boston Continental National Bank, full and true payment of note in the amount of twenty thousand dollars ($20,000.00) maturing Novem-

ber eighth, nineteen hundred and thirty-one, or of any extension thereof, in whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, the obligee shall notify the Home Office of such Surety at 80 John Street, New York City, New York, within ten (10) days, by registered mail, of such default and the Surety Company shall, within thirty (30) days, pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default, four months from date hereof and in no event exceeding twenty thousand dollars ($20,000.00); the liability of the Surety with respect to any such extension or renewal, in no event to extend beyond date of July eighth, nineteen hundred thirty-two.

Witness our hands and seals and dated this eighth day of July A. D. 1931.

GORDON A. ROBINSON
D/B as Robinson Engineering Co.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
[CORPORATE SEAL] by Percy G. Cliff, Attorney-in-fact

EXHIBIT H.

REPORT OF CERTAIN PORTIONS OF TESTIMONY

Counsel for the Surety Company objects to several of the findings of fact on the ground that they are not supported by sufficient evidence to justify the finding. These objections are now dealt with in the order of their appearance in the Report:

1. Page 17, first full paragraph. [Printed page 54.] It is objected that the inference and finding as to Cliff's knowledge is not justified. I decline to report the evidence on this point, since I have stated that this is a conclusion of fact drawn from subsidiary facts previously stated. No objection has been made upon the ground that any one of the subsidiary facts found was unsupported by sufficient evidence.

2. Pages 17–18. [Printed pages 54–55.] It is objected that findings as to what the National Bank Examiners discovered, concluded and reported are unjustified because of a limitation under which cer-

tain evidence was received. Fred D. Williams, Chief National Bank Examiner for this district, was testifying with one of the quintuplicate copies of the Examiners' reports before him. Counsel for the Receiver asked what notations were made by the Examiners opposite the Cronin, Westchester, Stone and Robinson loans. Counsel for the Surety Company objected "on the ground that it is immaterial to any of these cases that the existence of these bonds was brought to the attention of the National Bank Examiners and/or that they relied on them." I overruled this objection, and an exception was taken. Counsel for the Receiver stated that the "remarks" of the Examiner were offered "as remarks that went to this bank, were examined by the directors, that went to the Comptroller of the Currency, and that went to the Federal Reserve Bank. Not on the truth of the remarks at all."

I do not undestand that this colloquy does more than to prevent the evidence from being used as proof that the four loans in question were as sound as they were reported. The entire purpose of the offer was to establish the fact that these bonds had been relied upon by the responsible examining officials as securing the various loans.

3. Page 19, first paragraph. [Printed page 55.] It is objected that there is no evidence that "the Comptroller of the Currency insisted that $300,000 in new money be put into the bank, and threatened a notice of capital impairment under 12 U. S. C. Sec. 55." I am requested to report the evidence on this matter. It is as follows:

Fred D. Williams testified that the bank examination which ended March 3, 1931, showed a depreciation in the bond account at that time of $215,138.84, and an impairment of capital of $43,000; that he had something to do with negotiations with various parties relative to their putting in new money into the bank.

> *Q.* (by Mr. Hoar). And whether or not it is a fact that from time to time the date on which new capital was required or new money was required to be put into that bank was extended from time to time during the spring of that year? *A.* Yes, sir.
>
> *Q.* Did you have to do with that yourself, Mr. Williams, that extension? *A.* Well, only through my connection with the Comptroller's office. I think in some cases I recommended that they be given a little more time. We had reason to think that

the amount of money we desired to put into the bank was being raised. The extension of time was on the question of the Comptroller forwarding notice of capital impairment.

J. Dudley Clark testified that on June 29, 1931, he put $300,000 into the Boston-Continental National Bank; that he had talks with Ragan about it.

Q. (by Mr. Hoar). In connection with the bank examiner's report [of March, 1931] that you talked with Mr. Ragan about, did he say anything to you as to what that showed as to the depreciation in bonds? *A.* Yes, he did.

Q. And do you remember offhand the figures? *A.* Roughly, $300,000.

Q. And that was what you were asked to put your money in for? *A.* That is right.

Q. Was to— *A.* Make the bond account good.

Attention should also be called to the circumstances set forth in Judge Brewster's decision in *Clark* v. *Boston-Continental National Bank,* 9 F. Supp. 81.

4. Page 20, paragraph numbered (1). [Printed page 56.] It is objected that there is no evidence to support the finding that "that statement [to Forrester that the loans were secured by surety bonds] would not have been made if the bonds had not existed." This finding is, of course, a conclusion of fact which I draw from the subsidiary undisputed facts that Ragan was eager to get Clark to invest $300,000 in the bank and was trying to make an impression of soundness and honesty upon him. I infer that he would not have run the risks involved in a lie so easily discoverable by inspection of records and documents available to Forrester. On this issue there is no evidence to report other than that heretofore stated.

5. Page 21, lines 5–9. [Printed pages 56, 57.] It is objected that there is no evidence to support the finding that the Comptroller imposed no further requirement than the contribution of $300,000. This finding is based upon inferences drawn from the testimony of Mr. Williams, above quoted that "We had reason to think that the amount of money we desired to put into the bank was being raised"

and from the fact that, after Clark's contribution of $300,000, the bank was in fact allowed to continue in business until closed on December 17, 1931. See also *Clark* v. *Boston-Continental National Bank*, 9 F. Supp. 81. See also Clark's testimony, hereinafter set forth, as to what he was told by Ragan and Stoneman as to the Comptroller's requirements.

6. Page 21, lines 11 *et seq.* [Printed page 57.] It is objected that there is no evidence to support the finding that "the Comptroller relied directly upon the Examiners' having seen the Surety Company bonds." The evidence upon this matter was as follows:

O'Donnell testified that he was in charge of the bank's collateral; that as a matter of custom the first thing the Bank Examiners did in conducting an examination was to seal up the collateral so that they and no one else could have access to it; that they then proceeded to examine the collateral.

Fred D. Williams testified that he was the Chief Examiner for this district. He testified as to the contents of the reports of the three examinations referred to in the body of this Report. This testimony was received without other restriction than that stated with reference to the objection treated in paragraph (2) of this Exhibit. These reports showed statements that these various loans were secured by surety bonds. Williams also testified that one copy of the examiners' reports was sent to the Comptroller.

From this testimony I find that the Bank Examiners saw these bonds and that their notations in the reports of examination are to be taken as statements to that effect. From the fact that they were sent to the Comptroller I infer that they were read by him and that his action was based upon what he read.

7. Pages 24–25. [Printed pages 58–60.] It is objected that there was no evidence as to the practices or actual authority of the Comptroller and that the volumes referred to in the Report were not introduced in evidence.

The evidence on this point is the following:

a. William's testimony (above quoted) as to the pressure exerted in this particular instance to have the deficiency in the bond account

remedied. This I take as an indication of the modus operandi of the Comptroller.

b. Cliff testified that in each instance when Ragan requested a bond he did so on the ground that the Bank Examiners had to be satisfied. This I take as an indication of Ragan's solicitude to conform to the wishes of the Examiners.

c. Forrester Clark testified that after he became a director in the fall of 1931 the Executive Committee of the Board of Directors (which included Ragan) went over the loans which the Bank Examiners questioned to see whether they could be reduced or possible losses otherwise checked.

d. From the mere fact that an official body is appointed to examine into the affairs of a national bank, and to make a report to the Federal Reserve Bank (to which the bank must resort in large part for credit and support) and to the Directors (who elect the President) I am prepared to infer that the President of the bank would take any possible steps to avoid criticism by that body. This fact alone would give the Bank Examiners a very substantial practical authority.

The text book and the volume of the U. S. reports are, of course, referred to as indications of the administrative practices of a branch of the government so far as that may be judicially noticed.

8. Page 25. [Printed page 59.] It is objected that there is no evidence that the failure of the Comptroller to exercise his legal and practical authority with reference to these loans was in reliance on the bonds.

This is a conclusion of fact drawn from subsidiary facts previously stated.

9. Page 25. [Printed page 59.] It is objected that there is no sufficient evidence that "the depositors of these sums are still creditors of the bank in an amount exceeding the face value of these bonds".

One Long testified that between June 29, 1931, and December 17, 1931, there were received by the bank from new depositors $571,786.52, and that these depositors were still creditors of the bank at the time it closed in the amount of $258,511.13. The first figure was itemized in Exhibit 40 and examination of the figures indicates that

the deposits from new depositors after September 5, 1931, exceeded $300,000. There was no itemization of the second figure and it was therefore impossible to state with any accuracy the exact amount still owing to depositors since September 5. However, in the absence of any indication to the contrary I inferred that the percentage of withdrawals from deposits made after September 5 was not greater than the percentage of withdrawals from deposits made before September 5. Upon this basis I concluded that not less than half of the figure of $258,511.13 represented claims of creditors who became depositors after September 5, 1931.

10. Pages 19 to 23. [Printed pages 55–58.] It is objected that there is no sufficient evidence to support the finding that J. Dudley Clark relied upon these bonds. It is requested that the testimony of J. Dudley Clark and Forrester Clark on these points be reported in full, and I am convinced that this should be done to enable the Surety Company to present the question of law involved. This testimony constitutes all the evidence as to Clark's knowledge and reliance. It is as follows:

FORRESTER A. CLARK, Sworn.

Direct Examination by Mr. HOAR.

Q. Your full name is? *A.* Forrester Andrew Clark.

Q. And you are a son of J. Dudley Clark? *A.* Yes.

Q. Who is a senior member of the firm of Wainwright & Company? *A.* That is right . . .

Q. Your father put $300,000 into this bank on June 29, 1931? *A.* Yes.

Q. And did you on behalf of your father make certain investigations about the bank before that money was put in? *A.* Yes, I did.

Q. And when did you make those investigations? During what period? *A.* Between, I should say between the 5th and the end of June. The 5th and the 25th of June.

Q. And during the course of those investigations did you have occasion on more than one occasion to talk to Terrell M. Ragan about the bank? *A.* Yes, I did.

Q. He was then the president? *A.* Yes, he was.

Q. And at any time during that period did you have a talk with

Terrell M. Ragan concerning certain of the loans that the bank had outstanding which had been made to creditors? *A.* Yes, I did.

Q. Debtors, I should say. And what were the type of those loans? *A.* Both secured and unsecured.

Q. And were they large loans or small loans or both? *A.* Both.

Q. And what was the nature of that talk? As near as you can say what was said by Ragan and what was said by yourself?

Mr. Chase. Well, that I object to.

The Master. And what is the ground?

Mr. Chase. I don't know what the relevancy of the testimony is. A talk between this witness and Mr. Ragan.

Mr. Hoar. Well, I intend to show by this question and other questions of the same character following that this witness, representing his father, is a creditor to this bank to the extent of $300,000. His father's money was put into the bank relying on certain statements of Ragan which were made about the particular loans on which these bonds were given.

Mr. Chase. I object to it.

The Master. I admit that.

Mr. Chase. Subject to my exception.

The Master. Yes.

A. Well, I talked it over with Mr. Ragan—

Mr. Chase. What was said, I suppose.

Q. As nearly as you can remember? *A.* Well, I went over and asked Mr. Ragan, I told him that I wanted to check, I wanted to go over all the loans, all the important loans with him.

Q. And what, in substance was said? What was the general talk that you had with him about the loans? *A.* The general talk was—

Mr. Chase. No; I object. What was the talk?

Q. Well, what was the talk? You have got to give it as nearly as you can in substance, what the talk was. He said and I said. *A.* Mr. Ragan had a list of loans, and I asked him to go down the list and he went down the list of loans, each one, telling me whether they were secured or unsecured and what they were secured with and whether—stating that they were all good loans.

Q. And will you state whether or not in those talks the loans to

Arthur Cronin, Joseph Stone and the Westchester Discount Company were mentioned? *A.* Yes, they were mentioned.

Q. And what was said about those particular loans? Those three loans? *A.* He said they were secured by surety bonds.

Q. Did you see the bonds? *A.* No, I did not.

Q. Did he name the company that had issued the surety bonds? *A.* Not that I recall.

Q. And was that all in substance that was said about those three loans as you remember it? *A.* Well, I remember when they came up I asked him what a surety bond was and what it meant, and he explained that to me, and just the same as I took for granted when he said one loan was covered by 100 Steel and 100 Telephone, I took for granted that the bond was there. And when he had explained to me what they were I felt satisfied—

Mr. Chase. No.

Q. You cannot say that. You cannot say what you felt. But you say he said to you that these three loans I am talking about were secured by surety company bonds? *A.* That is correct.

Q. You don't think he mentioned the name of the company? *A.* He might have, but I don't recall it.

Q. Yes. And did you have conversations with your father after that? *A.* Yes, I did.

Q. As to what Ragan had told you about these loans? *A.* Yes, I did . . .

Q. When did you have these talks with Mr. Ragan that you have testified about? *A.* Between the 5th and the 25th of June.

Q. All right. When did you relate to your father the subject matter of those talks?

Mr. Chase. I pray your Honor's judgment as to that.

The Master. I admit that.

Mr. Chase. Note my exception.

A. Immediately after talking with Colonel Ragan . . .

Q. Was it before or after June 29, 1931—

Mr. Chase. That I object to.

The Master. I admit that.

Mr. Chase. Exception.

A. Before—

Cross Examination by Mr. CHASE.

X-Q. Well, where did you see those surety bonds? *A.* I did not see them . . .

X-Q. You didn't know of your own knowledge that there were any surety bonds? *A.* Mr. Ames saw them and told me so and I did not question his word. . . .

X-Q. You had not seen any surety bonds— *A.* No, sir.

X-Q. —purporting to cover those loans, had you? *A.* No, sir.

X-Q. And all you knew about it was what somebody else told you? *A.* That is correct.

X-Q. And that is what you meant when you answered my question and said that you knew of it? *A.* Yes, sir.

X-Q. You didn't know it of your own knowledge, did you? *A.* I did not see the surety bonds.

X-Q. So you did not know it of your own knowledge? It was because of what somebody else told you that you thought you knew? *A.* That is right.

X-Q. All right. Now who told you about those? *A.* Mr. Ragan first told me about them.

X-Q. Yes, he told you with reference to each of these four loans that I have mentioned that they were secured by surety bonds, didn't he? *A.* Yes, he did. Three then. Only three in June.

X-Q. Only three. Yes. Meaning the Cronin loan of $20,000, the Westchester and the Stone? *A.* Stone.

X-Q. Did you ask him if you could see those surety bonds? *A.* No, I did not.

X-Q. Why not? *A.* Why not?

X-Q. Yes. *A.* Why, he gave me a whole list of secured loans. I didn't think there was any reason—for instance, there was one loan of $20,000 secured by 100 Steel, 100 Motors, 100 United Fruit, and so forth, and I certainly could not have taken the time in those two weeks that I had, along with my own business and getting married, to have him show me every one of those things. And I took it for granted he was telling the truth.

X-Q. Now, you have given me a reason that convinces me very much. You were going to be married. Did you ever see those bonds? *A.* No, sir.

X-Q. So that so far as you have referred to those bonds you have been talking about something you have never seen? *A.* That is correct.

X-Q. As an officer of the bank you never saw them? *A.* As a director of the bank I never saw them.

X-Q. As a director. Did you ever ask to see them? *A.* No . . .

JOHN DUDLEY CLARK, Sworn.

Direct Examination by Mr. HOAR.

Q. Your full name is? *A.* John Dudley Clark.

Q. And where do you live? *A.* Legal or residence? My legal residence?

Q. Legal. *A.* Sherborn, Massachusetts.

Q. You are a senior member of Wainwright Company? *A.* I am.

Q. Have been for some time? *A.* Yes, sir.

Q. A brokerage concern in the city of Boston? *A.* That is right.

Q. Some time in the spring of 1931 did you become interested in the Boston-Continental National Bank, so called? *A.* I did.

Q. And did you later on put some money into that bank? *A.* I did.

Q. And how much was it? *A.* $300,000.

Q. And when was that? *A.* Well, I think it was in March, 1931, if I can remember.

Q. Would it refresh your memory if I told you that it was June 29, 1931? *A.* June.

Q. Now, before you put that money into the bank did you have various conferences with various people about the affairs of the bank? *A.* I did.

Q. And among those people were whom? *A.* Well, Mr. Ragan.

Q. The president of the bank? *A.* The president of the bank.

Q. Yes. *A.* And a man named Castle. And two or three directors of the bank.

Q. Yes. *A.* And I cannot remember exactly who else I did have it with.

Q. David Stoneman? *A.* David Stoneman; yes.

Q. And your son? *A.* And my son, of course.

Q. And your son's name is Forrester Clark? *A.* Forrester Clark.

Q. And at some time or other, before you put that money in, whether at some time or other you went over with Mr. Ragan certain loans in the bank? *A.* I went over three or four times, of course, and spent hours with him going over these loans.

Q. And did you do that by going over the loan cards? *A.* I did.

Q. And did your son also at your request make an investigation of the bank and its affairs? *A.* Yes. He spent much more time doing it than I did.

Q. And that was all done before your money was put into it? *A.* Yes.

Q. And did your son report to you from time to time as to the result of the various investigations he had made? *A.* He did.

Q. Did Mr. Ragan show you any statements of any kind outside of loan cards and loan things that you went over? *A.* Yes, he showed me a published statement in, I think it was the paper, of the condition of the bank.

Q. And you say that was a statement that was published in the paper or a copy of it that he showed you? *A.* A copy of it. A copy of the statement that was published in the paper.

Q. And was that a copy of the quarterly statement that was published in the newspapers? *A.* A quarterly statement, as I remember it.

Q. And do you remember for what quarter that statement was published that you saw a copy of? *A.* It was the quarter previous to, or the one near—it was the one at the time that he wanted me to put the money in, showing the condition of the bank.

Q. Well, would that be the one that was published around the end of March, if you put your money in in June? *A.* I think that was it; yes.

Q. And did you examine that statement? *A.* I did, very carefully.

Q. Now, did Tim at any time before you put your money into the bank—and when I say Tim I mean your son— *A.* Forrester.

Q. Forrester. —make any statement to you about certain loans and whether or not they were secured by surety company bonds? *A.* He did.

Q. And what did he say to you about that?

Mr. Chase. Now, may I make an objection here which will be a general one as to the testimony which follows of this character, which we anticipate.

The Master. And the basis of that objection?

Mr. Chase. Is that there is no reliance which can be based on anything which was said to Mr. Clark.

The Master. Yes, I understand that, and I overrule that objection and admit the testimony and save Judge Chase's exception to the line of testimony directed to establish reliance by Mr. J. Dudley Clark upon the status of loans as reported to him.

Q. Now, the question, Mr. Clark, was what your son said to you about any loans in connection with any surety company bonds? What he said? *A.* Well, on some of the larger loans I asked him if he checked up carefully on them and he said that on certain ones there were surety bonds guaranteeing those accounts, as I remember it.

Q. And did he name to you what those loans were? Do you remember? *A.* Yes, I think I remember some of them.

Q. Can you remember the names of some of them? What were they? *A.* Well, there was a Cronin loan.

Q. Yes. *A.* And a Westchester loan.

Q. Yes. *A.* And a man named Stone.

Q. Yes. In your talks with Ragan—I understand that you spent hours with him going over loans, and so forth? *A.* Yes, I did.

Q. Besides this statement, a copy of the statement, published statement, which you have testified about, did he show you or say anything to you about the report of the National Bank Examiner? *A.* He told me that he had a report and that the Bank Examiner reported the bank in excellent condition.

Q. And did you ask him to see the report? *A.* I did.

Q. By the way, do you remember for what period that report was or when it was made? *A.* I don't remember.

Q. How old was it when you talked with him? *A.* It was just a month or two old, as I understand it. It may not have been as old. It was the recent one made.

Q. The last one made? *A.* The last one made.

Q. And if it appeared that there was one made in March that would be the March report? *A.* I think so.

Q. And you say you asked him to see a copy of it or to see it? *A.* I asked to see it and he kept putting me off.

Q. Did you ever see it? *A.* I never saw it.

Q. Did you have any reason to suppose that when he kept putting you off his statements about it could not be relied upon by you? *A.* Not at all. I had absolute confidence in him.

Q. And is that true of all the other statements he made to you before you put your money in the bank? *A.* Absolutely, or I would not have put it in there.

Q. Now, in putting your money into the bank, will you tell me whether or not you relied in whole or in part on the statements that you have testified to that were made to you by your son Forrester and on the statement that was shown to you by Ragan and on the statement that Ragan made about the contents of that Bank Examiner's report? *A.* That is right, exactly. That is why I put my money in there. I had absolute confidence in him . . .

Q. Did you know in 1931 when you were talking with Mr. Ragan about the National Bank Examiner's report as to what the purposes were, the reasons that caused National Bank Examiners in general to make examinations and reports on banks?

Mr. Chase. This will all be covered by my objection.

The Master. Yes.

A. To see if the bank were solvent or not.

Q. And for the protection of whom? *A.* Of the depositors and the stockholders.

Q. And did you know then in detail as to what the National Bank Examiner and his assistants did when they examined a bank such as this one? *A.* I didn't know in detail, but I knew—

Q. Well, did you know in general what they did? *A.* Why, of course I did. I thought I did.

Q. And what in general did you know that they did at that time? *A.* They examined the loans.

Mr. Chase. Could he have known? . . .

The Master. Well, I can see a reason for an objection to that word "know". If you will amend that question so it will say "understand".

Mr. Hoar. I will amend the question . . .

Q. Did you have a general knowledge in 1931 as to what National Bank Examiners did when they examined national banks?

Mr. Chase. That I object to.

A. Yes.

Mr. Hoar. And his answer was yes.

Mr. Chase. Well, I objected to it before he answered.

The Master. Yes, I understood that objection was made before the answer was made, but I will allow that question and note Judge Chase's exception . . .

And I understand that your examination still is applying here to what his understanding is . . .

And that is admitted only for the purpose of showing Mr. Clark's state of mind.

Mr. Hoar. Yes.

A. Well, I understood that when a bank examiner made a report of the bank he went into all the details of the bank and found out the financial condition of the bank, that he examined the bank from bottom to top, the loans, both commercial loans and individual loans, and saw the condition of their investments and made a thorough report as to the exact condition in which he found that bank . . .

The Master. . . . I do understand, however, Mr. Clark, that your only knowledge as to the contents of the bank examiner's reports was what you were told by Mr. Ragan.

The Witness. That is right. And what my son found out from the various checkings of certain accounts and certain of their cards.

Q. And let me ask you this, Mr. Clark. . . . In connection with the bank examiner's report that you talked with Mr. Ragan about,

did he say anything to you as to what that showed as to the depreciation in bonds? *A.* Yes, he did.

Q. And do you remember offhand the figures? *A.* Roughly, $300,000.

Q. And that was what you were asked to put your money in for? *A.* That is right.

Q. Was to— *A.* Make the bond account good.

Q. Make the bond account good. Now, did you know at that time or were you told at that time by Mr. Ragan anything about the length of time that he, Mr. Ragan, had been given to get money to get that bond account good, to make that bond account good? *A.* A very short time. I don't know—

Q. You mean he did tell you? *A.* He told me it was a very short time. And that is why— I was going to have—

Q. Now, there was some question at one time or another as to whether you would not have an independent audit of that bank? *A.* That is right . . .

Q. What was the time if you remember that was fixed when the depreciation in the bond account had to be made up by putting in money? *A.* As I recall it was a week or ten days.

Q. And you mean by that, do you, and correct me if I am wrong, that that is the time you had to make this investigation after you decided that you were interested in it? *A.* That is right.

Q. And do you know who put that condition on that it must be a week, the money must be put in there within a week or ten days?

Mr. Chase. How could he?

The Master. Well, just a minute.

Q. Just say yes or no.

The Master. Well, the question was, was he told?

Mr. Hoar. Yes.

Q. Were you told? *A.* As I recall, I was told that it was the Federal examiner, comptroller of the currency.

Mr. Chase. I suppose Ragan told him.

Q. Who told you? *A.* Mr. Stoneman and Mr. Ragan both.

Q. Now, Mr. Clark, before you testified here you talked with me about this matter. *A.* I did.

Q. And you have gone over to some extent the testimony you gave in the case that you had against the bank? *A.* Yes, absolutely.

Mr. Hoar. I think that is all . . .

Cross Examination by Mr. CHASE.

X-Q. Mr. Clark, you were interested in the bank in some way before you met Mr. Ragan and talked with him about putting in money to supply the deficiency in the bond account, weren't you? *A.* Not to any great extent. I was interested in the old Boston National Bank.

X-Q. Yes. *A.* Simply as a stockholder.

X-Q. Which was merged with the Boston-Continental. *A.* Yes. But I had nothing to do with the Continental until I met Mr. Ragan.

X-Q. Well, your interest continued, didn't it, after the merger? Weren't you a stockholder? *A.* Well, not to any great extent; no.

X-Q. Well, you were a stockholder? *A.* I was a stockholder.

X-Q. And you had bought, either for yourself or for others, a substantial amount of the stock in the old bank? *A.* Yes, I held a substantial amount at one time . . . 1120 shares, I think.

X-Q. It is true, isn't it, that at the time you began these conversations with Mr. Ragan you were a stockholder? *A.* I was a stockholder; yes.

X-Q. You had some very substantial customers in your brokerage house that were very closely interested in the bank, didn't you? *A.* Yes, I had quite a number of those, too.

X-Q. And through them you had heard a good deal about the bank? *A.* Yes.

X-Q. And you knew they were interested in the success of the bank and knew that they were closely in touch with the management and affairs of the bank, didn't you? *A.* Yes, I imagine some of them were.

X-Q. And it was from one of your customers, wasn't it, that the suggestion that you become interested in some way, financially interested outside of being a stockholder in the bank, came? *A.* Yes.

X-Q. And that was through Mr. Castle? *A.* Mr. Castle.

X-Q. And he was a man who was not only a very substantial cus-

tomer in your house but a man in whom you had great confidence? *A.* I did.

X-Q. And you also had in mind, didn't you, after the matter was mentioned to you, the possibility of an opening for your son in the bank? *A.* No, not necessarily that.

X-Q. Not necessarily? *A.* No.

X-Q. But you did have it in mind? *A.* It might have been.

X-Q. Yes. And you had another thing in mind, didn't you, and this was suggested to you by Mr. Castle, wasn't it, that through an intimate financial connection with the bank you might acquire customers who would be valuable in your business, in your own business? *A.* That is true.

X-Q. And in fact that was held out to you as an inducement by Ragan, wasn't it? *A.* It was.

X-Q. And you did acquire substantial customers— *A.* That is right.

X-Q. —who were profitable to your brokerage house through the connections which you made with the bank, didn't you? *A.* Yes, sir.

X-Q. Now, you have said that amongst those whom you talked with was Mr. Stoneman? *A.* Yes.

X-Q. Who is Mr. Stoneman? *A.* He is a lawyer and he was at one time a director of the bank.

X-Q. Was he at the time when you talked with him? *A.* Yes.

X-Q. First? A director? *A.* Yes, a director of the bank.

X-Q. Well, wasn't he counsel for the bank? *A.* I think he was counsel also.

X-Q. Wasn't he counsel for the bank, and interested at that time particularly in finding somebody, who ultimately proved to be yourself, who would put in money to supply the deficiency in the bond account? *A.* I think so, yes. He spoke about it.

X-Q. And you had extended talks with Mr. Stoneman? *A.* I did.

X-Q. And you had extended talks with Mr. Castle, didn't you? *A.* Yes.

X-Q. And Mr. Castle, when the receiver was appointed, was a very large debtor to the bank, wasn't he? . . . *A.* I don't know about that.

X-Q. Well, if you don't know about it, I will drop it. You also had talks with Mr. Balter, didn't you? *A.* Yes, sir.

X-Q. And he was another customer of your business house? *A.* That is right.

X-Q. And isn't the question which I just asked you with reference to Mr. Castle true of Mr. Balter, that he was a large debtor of the bank? . . . *A.* I think it turned out to be that he was.

X-Q. And before the Receiver was appointed the loan to Mr. Balter was a matter of grave discussion in the bank, wasn't it? *A.* Before when?

X-Q. The loan to Mr. Balter, before the Receiver was appointed? *A.* No, I hadn't heard that . . .

X-Q. You never saw any bonds, surety bonds, in the bank? *A.* No, I never did.

X-Q. You never saw any powers of attorney in the bank? *A.* I didn't see those.

X-Q. You never asked to see them? *A.* I never asked to see them.

X-Q. You never heard any surety company mentioned as being surety on any of the bonds which you have said Mr. Ragan spoke to you about? *A.* Before I went into it?

X-Q. Yes. *A.* My son told me—

X-Q. No. You never heard the name of any surety company mentioned? *A.* Well, I am not so sure about that.

X-Q. You don't recall that you did? *A.* I can't recall it right now; no.

X-Q. It took some time, didn't it, for Mr. Castle, for Mr. Stoneman and for Mr. Ragan to get you interested? *A.* Yes, it did. Some time but not a great deal.

X-Q. That is, at first you said it did not interest you at all? *A.* Yes, absolutely.

X-Q. And because of what they said to you, and they alone, you finally did say you might be interested? *A.* That is right.

X-Q. And it was because of what they told you? *A.* That is right.

X-Q. That you said that? *A.* Yes.

X-Q. Now, you say that your son went over to the bank and spent some time there with Mr. Ragan? *A.* He did.

X-Q. Now, you say also that you have been over the testimony which you gave in your suit against the bank recently? *A.* I have.

X-Q. With Mr. Hoar? That is so, isn't it? *A.* Yes.

X-Q. Now, you did testify in that case at length? *A.* I did.

X-Q. Concerning all of the negotiations that led up to your putting in the $300,000? *A.* Right.

X-Q. That is right, isn't it? *A.* Right.

X-Q. And all of your subsequent connections which you had with the bank and what you did and what you heard and what was told you, you testified at great length about that? *A.* I did.

X-Q. And you were cross-examined by Mr. Hoar? *A.* I was.

X-Q. Who was counsel for the Receiver in that case? *A.* That is right . . .

X-Q. Didn't you testify in that case that you told your son to look into the condition of the bank? *A.* Why, of course I did.

X-Q. Yes. And didn't you testify in that case that he went over to the bank and spent several days there? *A.* Yes.

X-Q. And didn't you also say "I don't know what he was doing there. He said he was looking into the affairs of the bank but he made no definite statement to me." Or in substance that? *A.* What does that refer to?

X-Q. It refers to what your son was doing in the bank and what he said to you? *A.* Well—

X-Q. My only question is, Didn't you so testify? *A.* Well, if it is there I must have testified to that . . .

X-Q. You now say, do you not, that you yourself went over to the bank and talked with Mr. Ragan about loans? *A.* Yes.

X-Q. And that you spent some time there? *A.* I did off and on; yes.

X-Q. Now, as a matter of fact didn't Mr. Ragan at that time have on his desk for your inspection the loan cards of the persons to whom the bank had loaned money? *A.* He did.

X-Q. And there were a great number of them there? *A.* A lot.

X-Q. And they were produced by him for your inspection? *A.* That is right.

X-Q. In response to your request? *A.* That is right,

X-Q. And there were from 500 to 1,000 of them, weren't there? *A.* I should think there were that many, yes.

X-Q. And those were placed on Mr. Ragan's desk by him for your inspection and you were invited in some form of words to ask him any questions about any one of them or any of them that you wanted to? *A.* That is right.

X-Q. And that is what you did? *A.* I did.

X-Q. That is you ran through them, I assume? *A.* I ran over them.

X-Q. And took out those that you knew—you knew some of the borrowers, I assume? *A.* I knew some of them, yes.

X-Q. And as to those, of course, you did not ask any questions, did you? *A.* Yes, I asked him about different ones and he gave me an explanation for each one.

X-Q. I assume that you did not take out each card and ask him about each one of those five hundred or one thousand? *A.* No, because I had confidence in Mr. Ragan then.

X-Q. You had confidence in him and if he told you that those loans were all right you believed him? *A.* I did.

X-Q. So that so far as these loan cards were concerned it was largely a matter of formality or curiosity to see who the borrowers were? Is that so? *A.* Well, not necessarily.

X-Q. Not at all. Nothing is necessarily. But isn't that so? *A.* I thought the cards any president of a bank would show you were legitimate cards.

X-Q. Surely. And you did not inspect them very carefully and did not ask very searching questions about them, did you? *A.* Well, I did on certain ones, yes, I did.

X-Q. And the certain ones were the ones you knew about, names that you knew? *A.* No, not necessarily. Some I didn't know at all.

X-Q. And you were asked about that in your case against the bank, weren't you? And didn't you say that Mr. Ragan said they were absolutely O. K. and that he knew these borrowers personally and they were all right? *A.* Yes.

X-Q. And that applied to the whole batch, didn't it? *A.* Practically; yes. I imagine so.

X-Q. And didn't you say that the ones that you looked at were all O. K.? And I am using O. K. as your expression in your testimony? *A.* The ones which I saw, so far as I knew, they were O. K.

X-Q. The ones you looked at so far as you knew they were O. K.? *A.* Yes.

X-Q. And didn't you say also, "Maybe he had some that were not, but I didn't see them"? *A.* Maybe there were. That is the remark I made.

X-Q. And didn't you say that you picked out the cards that he was to make comments on? *A.* Yes, I did. I think I said that.

X-Q. And that they were collateral loan cards secured by stock exchange collateral? *A.* Some were and some were not.

X-Q. And that there was also a list of unsecured loans and you went over those? *A.* There were.

X-Q. And asked about persons? *A.* Yes.

X-Q. Now, didn't you also testify in that case that you did not remember the names of the cards that you discussed, the borrowers that you discussed with Mr. Ragan? *A.* I didn't remember them all.

X-Q. Didn't you say that you did not remember the names? *A.* If that is my testimony at the time, that is the statement I made.

X-Q. And didn't you also then say that Stone was one of those mentioned? *A.* Did I say what? I didn't get it.

X-Q. Didn't you also say then that Stone was one of those who were mentioned? *A.* Yes, I think I did.

X-Q. And didn't you further say that all that Mr. Ragan said about Stone was that he was a personal friend of his and that he was perfectly sure that was a good loan and that you didn't remember especially about it then, at the time you so testified? *A.* Well, that may have been my testimony then, but my son during this whole thing did tell me about those things.

X-Q. Wait a minute.

Mr. Chase. I ask to have that stricken out.

X-Q. And I am asking you now about what your testimony was in the other case when that was tried? *A.* Well, if that is my testimony.

X-Q. Well, is it your testimony or not? *A.* What?

X-Q. Is it your testimony or not? *A.* Well, it must have been.

X-Q. And didn't you also say when you testified before about this that you could not recall about the Cronin loans? *A.* I don't remember that now. I should have remembered Cronin because of course he was a customer of mine also and I should have remembered that very well.

X-Q. Cronin was a customer? *A.* He was a customer.

X-Q. You had confidence in him? *A.* I did at that time.

X-Q. And you believed his loan was good? *A.* What?

X-Q. You believed this loan was good from what you knew about him? *A.* Well, I think so; yes.

X-Q. Now, you have already said, Mr. Clark, that you did have confidence in Ragan. You had confidence in him? *A.* In whom?

X-Q. In Ragan. *A.* Yes, I did.

X-Q. And believed him absolutely as long as he lived, from the time when you first met him in connection with this matter, didn't you? *A.* I did.

X-Q. You bought, from the spring of 1931 up to the time of his death, you bought a very substantial amount of stock for him, didn't you? . . . *A.* I did. I bought quite a lot of stock.

X-Q. That ran into the thousands of shares? *A.* Not in the thousands. Probably—yes, probably thousands.

X-Q. And Ragan didn't pay you for that, for the stock? . . .

X-Q. That is so, isn't it? *A.* I bought it for myself, not for Ragan.

X-Q. For yourself? *A.* For myself.

X-Q. So that you were holding stock for him and you also bought it for yourself? *A.* Holding stock for Ragan?

X-Q. Yes. *A.* No; I was buying it for myself.

X-Q. You bought it on his order, didn't you? *A.* On his order?

X-Q. Yes. *A.* I bought it for my own order.

X-Q. Well, didn't you buy any stock for Ragan personally, himself? *A.* I don't recall now.

X-Q. Didn't you hold a life insurance policy of his in $50,000? *A.* Oh, yes, that is true.

X-Q. As security for stock which you bought for him? . . . *A.* That is right . . .

A. I had absolute confidence in Ragan . . .

X-Q. Well, when did Ragan die? *A.* Well, I don't remember now. He did die . . .

The Master. March 1, 1932, wasn't it?

Mr. Hoar. Right.

X-Q. How long before he died did you get that insurance policy? *A.* Well, I should say two or three months before.

X-Q. And that was the only security that you had for the stock which you purchased? . . . *A.* Well, I admit I had confidence in him right up to the end, to his death.

X-Q. I understand, and I think it is perfectly plain, but I think the extent of your confidence in him is what I am interested in at this moment. And the day before he died he asked you for that insurance policy? *A.* He did.

X-Q. And you gave it to him? *A.* I did. I had confidence in him then.

X-Q. And he said he would return it to you? *A.* He said he would return it to me.

X-Q. And you found, after he died, on the day after you gave it to him he made it over to his wife? *A.* That is right.

X-Q. Now, did you ever have any talk with Mr. Williams, the bank examiner, before you put any money into this bank? *A.* I cannot recall now whether it was just before or just after.

X-Q. You cannot say, can you? *A.* I cannot.

X-Q. You have said— *A.* Well, I remember now, I think.

X-Q. You remember now that you didn't? *A.* What?

X-Q. You remember now that you didn't have it? *A.* Well, I think still I did.

X-Q. You testified in your case against the bank that you never saw him before that, didn't you, positively? *A.* Well, I may have. I don't remember now. . . .

X-Q. Now, were you told by Mr. Stoneman or by Mr. Castle or anybody that along in May, 1931 the United States Attorney was in-

vestigating an act or acts of Mr. Ragan in connection with his management of the bank? *A.* No.

X-Q. Nobody ever told you that? *A.* Not that I remember.

X-Q. Mr. Stoneman or anybody else? *A.* No . . .

X-Q. You asked Mr. Ragan for the bank examiner's report, didn't you? *A.* I did.

X-Q. He didn't give it to you? *A.* No, he had some excuse.

X-Q. He had some excuse, one excuse or the other. *A.* I was just

X-Q. And you never did get it? *A.* I never did get it.

X-Q. And you never saw it? *A.* I never saw it.

X-Q. Did he ever tell you what was in the bank examiner's report? *A.* Not any more than it was entirely satisfactory.

X-Q. To him? *A.* To him.

X-Q. And that is all you know about the bank examiner? *A.* That is right.

X-Q. And nobody else ever showed you the bank examiner's report? *A.* No.

X-Q. You were given to understand that it was necessary or it was desirable to have the deficiency in the bond account made up in some way? *A.* That is right.

The Master. I don't know quite what that answer is. Did you understand it was necessary or desirable?

The Witness. It was necessary and desirable both.

X-Q. Did anybody ever tell you that the authorities had said that it was also necessary that Mr. Ragan should be removed as president, or supplanted?

Mr. Hoar. I object to that question until the time is apparent.

X-Q. Before you put any money in? *A.* Not before I put any money in; no . . .

X-Q. You had confidence in Ragan—I will preface that with another question. You did hear things before Mr. Ragan died and before this Receiver was appointed respecting Mr. Ragan's management of the bank, didn't you? *A.* Yes . . .

X-Q. Mr. Clark, this is true, isn't it, that with reference to any one of these loans that were shown to you, if Mr. Ragan had told you

himself, had given you his assurance that they were all good loans you would have believed him?

Mr. Hoar. I object to that.

The Master. No. I admit that.

Mr. Hoar. Your Honor will save my exception to that.

The Master. Yes.

A. Well, I am inclined to believe it, because I would go and ask him about it and he would prove it to me, or give some excuse . . .

X-Q. And I will take any one of these 500 to 1,000 loans, the cards for which were produced there on Mr. Ragan's desk, and which you say you went over some of with him, if you had criticized any of those loans, and Mr. Ragan had given you his assurance that they were good, you would have taken his assurance, wouldn't you? *A.* I would have been inclined to because the bank examiner was supposed to have got it, and he would have given some reason for it and I would have believed it.

X-Q. Mr. Ragan we are talking about now. We will leave the bank examiner out for the moment. If Mr. Ragan at that time had assured you that that particular loan was good, any loan that you questioned, you would have taken his assurance, would you not? *A.* Why, absolutely. He was president of the bank and I had confidence in him . . .

X-Q. You would absolutely take Mr. Ragan's assurance, would you not? *A.* He was president of the bank. I would.

X-Q. And you did? *A.* I did.

X-Q. You did not ask him when he told you that a loan was good, why? You did not ask him to explain why it was good and upon what he placed his reliance in assuring you that it was good, did you? *A.* I might have on some of them. I don't recall now.

X-Q. But you cannot recall any that you did? *A.* I cannot recall now.

X-Q. And it would not have made any difference to you, Mr. Clark, relying upon him as implicitly as you say you did, whether there was a surety bond or collateral securing a note, or whether the loan was unsecured, would it? *A.* Oh, I think it would have. He must have some reason for it for being good.

X-Q. Well, all right. Suppose he had a note there that you had heard was questioned by somebody and you said, "Well, Mr. Ragan, Mr. X has told me that that note is not good, that there is a defense to that note", and Ragan had assured you that that absolutely was good and that he knew it, you would have taken his assurance, wouldn't you? *A.* Well, I think that may have been just what happened here at the time that my son went over and saw these notes.

X-Q. Well, you would have taken his assurance, wouldn't you? *A.* I would have been inclined to take it; yes.

X-Q. That is it was Ragan that you relied on and your reliance on him was induced by your confidence in him? *A.* That is right . . .

X-Q. As a matter of fact, Mr. Clark, some time after June and before the Receiver was appointed, the examiner himself did criticise certain loans that Mr. Ragan had made, didn't he? *A.* He did.

X-Q. To you personally?

The Master. Now, pardon me. I did not get the time of this question. I understand this was after Mr. Clark had put his money in.

Mr. Hoar. Yes.

Mr. Chase. Yes, sir.

X-Q. He did? *A.* He did.

X-Q. Do you remember what those were? *A.* I don't remember now.

X-Q. They were pretty heavy loans, weren't they? *A.* I think so. I went over to Mr. Ragan and he—

X-Q. Yes. And you told Mr. Williams, the examiner, when he criticized those loans as being improper that sometimes opinions—individuals differed as to what was a good loan and what was not? *A.* I do not recall having said that to him.

X-Q. You so testified, didn't you, in the other case? *A.* Well, then it must be so.

X-Q. Well, the sum and substance of it is that when Mr. Williams did criticize those loans that you preferred to rest on Ragan's judgment rather than Mr. Williams'? Isn't that so? *A.* Not necessarily, no.

X-Q. Not necessarily, but as a matter of fact it is so? *A.* Well—

X-Q. You took Ragan's side as against Mr. Williams, didn't you? *A.* I went over to Mr. Ragan and asked him about these loans and he said. "Those can be worked out this way", and we thought we could work them out that way.

X-Q. And you were satisfied with that? *A.* Well, what else could I do?

X-Q. Well, I am not asking you that. I say you were satisfied with that in answer to Mr. Williams' criticism? You got Ragan's assurance again, didn't you? *A.* I got Ragan's assurance that they would work out . . .

Redirect Examination by Mr. HOAR.

Q. As a matter of fact, Mr. Clark, when your son Tim told you that Ragan had told him that these three loans which you named were secured by surety company bonds you relied on that because you had implicit confidence in Ragan? Isn't that correct? *A.* Absolutely.

Mr. Chase. I object to that.

The Master. Now, that is objected to on what ground?

Mr. Chase. On the ground it has already been covered and it was leading. Mr. Hoar examined the witness fully about it.

The Master. Yes, but I will admit that question.

Mr. Chase. My exception . . .

Q. Now, there has been something said about an insurance policy, and I do not want to spend any time on it, your Honor, but I want to get the facts right.

Q. Around the 14th of December, 1931, three days before the bank closed, you delivered or caused to be delivered to Mr. Ragan a block of stock of the Boston-Continental Bank or voting certificate for that stock? That is right, isn't it? *A.* Yes.

Q. And you got at that time an insurance policy for $50,000 from Mr. Ragan to secure you on the payment of the purchase price? That is what it was for, isn't it? *A.* That is right . . .

Examination by the Master.

Q. Before you put the money into the bank on June 29, 1931, was it your understanding that the Comptroller of the Currency required $300,000 be put into the bank by some person before some limited

date, and that there was no other requirement? *A.* Absolutely, and I got a letter from him stating that it was with his approval that this was done. I think that letter is on file, isn't it?

Q. It is not in the evidence, and I must say that that part of your answer dealing with that letter ought to be excluded for the moment as unresponsive. But I am going to follow that up with one more question. Perhaps it is already answered, but I would like to be sure that I have the answer. Did you understand that there was no other requirement imposed by the Comptroller of the Currency to permit the bank to continue in business? *A.* Absolutely.

Q. And I am now going to ask you whether or not in any part you relied upon that situation as indicating the judgment of the Comptroller of the Currency as to the soundness of the bank? *A.* I should not have gone into it unless I had that letter from the Comptroller of the Currency. It influenced me very much.

Recross Examination by Mr. CHASE.

X-Q. And that information you got from Mr. Ragan. *A.* I got it from—that information?

X-Q. Yes. *A.* I got the letter addressed to me from the Comptroller of the Currency.

X-Q. Well, that letter I do not think is in evidence. If it is not, I do not want to go into the contents of it. But that referred to nothing but the $300,000. Now, I am asking you with reference to your understanding that that was the only requirement that the Comptroller put upon the continuance of the bank in business. And that assurance you got from Mr. Ragan? That nothing else was necessary? *A.* Well, I insisted upon getting that from the Comptroller of the Currency himself.

X-Q. But the Comptroller of the Currency never told you that there was nothing else necessary except to put in $300,000? *A.* The Comptroller of the Currency knew that $300,000 was going in and with that I understood the bank could proceed.

X-Q. That is all he approved of? *A.* What?

X-Q. The putting in of the $300,000? *A.* That is what he wanted.

X-Q. He never told you that nothing else was the matter with the

bank? *A.* Well, he didn't tell me so, but he permitted me to believe in this letter.

X-Q. That answers the question. And any understanding that the requirement that $300,000 be put in before a certain date was the only requirement that the Comptroller made— *A.* That is what I understood was the only requirement.

X-Q. —came from Mr. Ragan? *A.* Yes, it did.

Mr. Chase. That is all.

Redirect Examination by Mr. HOAR.

Q. Wasn't there anybody else told you that also besides Mr. Ragan?

Mr. Chase. I object to that.

The Master. No, I think that is all right.

Mr. Chase. I do not think he ought to lead this witness.

A. It was the bank examiner, as I understand it, that also said so.

The Master. To you?

The Witness. To me or to my son.

Q. Now, Mr. Clark, let me refresh your recollection. As far as the other case is concerned your testimony was, I think it is a fair statement, that you did not see Mr. Williams, the bank examiner, until after this money was put in, and I think it was finally left that some time in August was the first time you saw him. You had talks with Mr. Stoneman and Mr. Castle, as you testified in answer to my brother's question? *A.* That is right.

Q. And you have just answered a question— *A.* Mr. Stoneman—

Q. Just a minute. You have just answered a question to my brother that this requirement that $300,000 was the only requirement that the Comptroller of the Currency wanted, you heard that from Mr. Ragan? *A.* Yes.

Q. Now, I am asking you if you heard that from anybody else besides Mr. Ragan, if you remember? *A.* Mr. Stoneman . . .

Q. . . . I want to show you a letter, and this is a transcript of the evidence in your case, what purports to be a copy of a letter addressed to Mr. David Stoneman, Boston, Mass., and I ask you if that is a copy of the letter that you just referred to as having been received from the Comptroller? *A.* That is the one.

Q. As a matter of fact it came from Mr. Williams? *A.* Well, I insisted—

Q. This came from Mr. Williams? That is the one you referred to? *A.* That is the one I referred to . . .

It was agreed by counsel that the statements attributed by Mr. Chase to J. Dudley Clark in the latter's testimony in *Clark* v. *Boston-Continental National Bank* were in fact made by Clark.

EXHIBIT J.

ADDITIONAL FINDING REQUESTED BY RECEIVER.

On November 12, 1931, Oliver Ames, a Vice-President of the Bank dictated to Ragan's secretary in his presence a letter to the Surety Company stating that Robinson had asked for a renewal of his note and requesting the Company to confirm in writing their liability with reference to such a renewal. Ragan intercepted this letter before it got into the mails. He had Cliff write to the Bank as manager of the Boston Branch Office of the Surety Company informing the Bank that Ames's letter had been sent to him by the Home Office for answer, that he (Cliff) handled all New England business and that all questions should thereafter be referred to him, that the terms of the bond were explicit as to renewals, that there was no necessity for notice as to renewals and extensions and that "notice is required only within the stipulated period after the expiration of the bond itself." This letter was on stationery of the Surety Company. Cliff had no authority to send it. Ragan knew this, but the other officers and directors did not.

On the fourteenth day of said June, the following Plaintiff's Exceptions to Auditor's Report was filed:

PLAINTIFF'S EXCEPTIONS TO AUDITOR'S REPORT.

[Filed June 14, 1935.]

Now comes the plaintiff in the above-entitled cause and files the following exceptions to the report of the auditor filed herein on June 6, 1935, to wit:

1. To the ruling of the auditor that the Westchester bond dated December 20, 1930, and "endorsements" do not secure payment of the note of forty thousand dollars ($40,000) of Westchester Discount Corporation dated December 23, 1930, and that there can be no recovery upon this bond and "endorsements". (Auditor's report, pages 40, 41 and 49 of the original). [Printed pages 71, 72, 78.]

By their Attorneys,

GOODWIN, PROCTER & HOAR.

This cause was thence continued to the June Term, A. D. 1935, when, to wit, June 26, 1935, the following Exceptions of Standard Surety & Casualty Company of New York were filed:

EXCEPTIONS OF STANDARD SURETY & CASUALTY COMPANY OF NEW YORK TO REPORT OF MASTER AND AUDITOR.

[Filed June 26, 1935.]

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3850 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

Now comes Standard Surety & Casualty Company of New York and files the following exceptions to the report of the master and auditor:

1. To the statement on page 3 (1) of the report that the Surety Company contends that the bonds in suit were given "designed to deceive various persons as to the soundness of the notes".

2. To the statement on page 3 (4) of the report that the Surety Company contends that the receiver "by bringing a certain suit against the Fidelity & Deposit Company of Maryland elected a remedy which was inconsistent with the remedy now sought" without adding the remainder of the Surety Company's claim "and allowed said suit to go to judgment in his favor in the sum of $100,000, and allowed such judgment to be satisfied".

3. To the findings on pages 9 and 13 of the report, that each new note was a renewal or extension of the note first given.

4. To the finding (by inference) on page 17 of the report that Cliff knew that the bonds in question "would be shown to the bank's directors, to the representatives of the Boston National Bank in merger negotiations, and to any other person entitled to enquire as to the soundness of the notes they purported to secure and that the purpose of the showing would be to deceive the person so enquiring".

5. To the findings on pages 17 and 18 of the report as to what the national bank examiners discovered, concluded and reported.

6. To the finding on page 19 of the report that: "The Comptroller of the Currency insisted that $300,000 in new money be put into the bank, and threatened a notice of capital impairment under 12 U. S. C. sec. 55."

7. To the finding on page 20 (1) of the report that "that statement would not have been made if the bonds had not existed".

8. To the conclusion and finding on page 20 (1) of the report that, upon the evidence reported, "Clark indirectly relied upon the Cronin, Stone and Westchester bonds".

9. To the findings on page 21 (2) of the report that, upon the evidence reported, the Comptroller had imposed a requirement that $300,000 be contributed to the bank—"and had imposed no further requirement", that Clark relied upon this fact, and that the Comptroller relied directly upon the examiners having seen the Surety Company bonds; that he would have imposed further requirements if it had been known that the Cronin and Westchester loans were unsecured; that the Cronin and Westchester bonds induced the Comptroller's action; that Clark relied upon the willingness of the Comptroller to allow the bank to continue in business upon contribution of $300,000 as an indication that the condition of the bank was otherwise sufficient for continuance of business; and that Clark indirectly relied upon the existence of the Cronin and Westchester bonds, and to the conclusions and findings on page 23 of the report that Clark relied upon the existence of these bonds in investing $300,000 in the bank.

10. To the finding on pages 22 and 23 (4) of the report, that "there are limits to credulity. One loan might have been approved on Ragan's unsupported statement but not three totalling $112,000".

11. To the findings on page 23 of the report that the Cronin, Stone and Westchester bonds induced Forrester's statement and that the Cronin and Westchester bonds induced the Comptroller's action.

12. To the inference and findings set forth on pages 24 and 25 of the report that the Comptroller relied upon the bonds, and as to what the Comptroller of the Currency would, or might, have done

for the protection of depositors old and new, his powers and practices, and the findings of fact made from reported cases and books, and the finding that subsequent to the bank examination of August-September, 1931, new deposits were made in the bank exceeding $300,000 and that depositors of these sums are still creditors of the bank in an amount exceeding the face value of the bonds.

13. To the ruling on page 25 of the report that the facts stated justify a conclusion that depositors relied upon the bonds in question, and the conclusion to that effect, and the influence of reported cases upon the master and auditor in coming to that conclusion as stated by him on page 26 of the report.

14. To the ruling on page 26 of the report that "a reliance by the Comptroller and examiners should have the same legal consequences as a direct reliance by the depositors".

15. To the ruling (2), made on page 27 of the report "that the bonds and 'endorsements' in suit are binding obligations of the Surety Company in spite of the limitations on Cliff's authority contained in the 'Letter of Instructions' and in spite of the fact that the bonds were written without premium, unless Ragan's knowledge of those infirmities binds the receiver".

16. To the ruling on page 27 of the report that there was sufficient consideration to support the "endorsements" as contracts.

17. To the finding and ruling on page 27 of the report that the bank forebore from suing on the bonds, and that this is a sufficient *quid pro quo* to support the "endorsements" as contracts.

18. To the ruling (4), on page 32 of the report, "that the bonds and 'endorsements' in suit are binding obligations in the hands of the receiver due to the fact that he represents the Bank's creditors".

19. To the ruling and implied finding of the master, that Cliff gave the bonds to deceive creditors, involved in the statement on page 32 of the report:

> "If the Surety Company, by its duly authorized principal officers, had given these bonds for the purpose of deceiving the national bank examiners and creditors, the receiver could recover on the bonds",

followed on page 36 of the report by the statement:

"If, then, the Surety Company by authorized agents had done what Cliff did, it would be liable."

20. To the statement of the master at the bottom of page 36 of the report that: "Anyone can see that such a procedure invites misuse of the equipment thus provided."

21. To the rulings on page 37 of the report that "the Surety Company is estopped to deny that the bonds and 'endorsements' are the effective instruments which they appeared to be", and that Ragan's knowledge does not affect the receiver.

22. To the ruling (5) on page 40 of the report "that the 'releases' given by Ragan and the statement that the bonds would not be enforced do not relieve the Surety Company of liability on the bonds to the receiver".

23. To the ruling (7) on page 41 of the report "that the new notes given by Cronin and Robinson upon and after the maturity of existing notes were 'extensions' and 'extensions or renewals' of the original Cronin and Robinson notes within the meaning of the Cronin and Robinson bonds and endorsements".

24. To the ruling (8) on page 42 of the report "that Stone's present obligation to the bank and the receiver is the 'obligation in the sum of $52,000.' referred to in the Stone bond, and that the obligation referred to in the Stone bond has not been paid or discharged by any new notes which Stone gave to the bank as other notes matured".

25. To the ruling (9) on page 42 of the report "that the giving of notice of default within ten days was not a condition precedent to recovery under any of these bonds and that, there being no evidence of damage to the company from such delay as may have existed, the company has no defense based upon the requirement of notice".

26. To the finding and ruling (10) on page 46 of the report "that the bank gave notice of default to the Surety Company as required by the Cronin bond".

27. To the rulings on pages 48 and 49 of the report "that the 'endorsements' of the Cronin bond are amendments to the original contract of suretyship and hence new contracts executed by Cliff and that

they fall within the terms of his authority as stated in his power of attorney", and "that the word 'default' in the suretyship contract as thus amended means the failure of Cronin to pay, on November 3, 1932, the full amount due upon the original note of $20,000 or any renewal or extension thereof", that the notice of default given on November 4, 1932, "complied with the requirement of notice", and that the facts stated "do not show non-compliance with the requirement of notice of default in the (Cronin) bond as amended by the endorsements".

28. To the finding and ruling (11) on pages 49, 50 of the report "that the notice of default required by the Westchester bond as amended by the endorsements, was given".

29. To the ruling on page 50 of the report that the endorsements constituted contracts.

30. To the ruling on page 52 of the report that the words "four months from date hereof" in the Robinson bond are to be disregarded.

31. To the wording of the finding on page 54 of the report that the Surety Company claims that the election by the receiver "absolves the Surety Company from liability", the Surety Company's claim being, not that the Surety Company is absolved, but that the receiver is barred, because it is unconscionable that he should recover in one case upon the sworn statement that the bonds were fraudulent and uncollectable, and, after obtaining a judgment in his favor on that claim, that he should then be heard in the same court to make the opposite claim as a basis of further recovery.

32. To the ruling of law on page 61 of the report "that there has been no election of remedy which is a defense to the receiver's claims in the present litigation".

33. To the ruling on page 62 of the report that "the receiver never disaffirmed these bonds or any obligation of the Surety Company which they may create".

34. To the ruling on page 62 of the report that "the remedy of the receiver, against the F. & D. was not inconsistent with his remedy against the Surety Company".

35. To the ruling on page 62 of the report "that the F. & D. was

in the position of a sub-surety with reference to these notes and bonds".

36. To the ruling on page 63 of the report that the receiver's allegations in the notices and proofs of loss "that these bonds were fraudulent, invalid and uncollectable", "were conclusions of law, uttered for the sole purpose of giving the F. & D. notice of the claims against it", and "that these conclusions did not indicate an intention to disaffirm the bonds".

37. To the ruling on page 63 of the report that the Surety Company has not been harmed by the receiver's notice and proof of claim against the F. & D.

38. To the ruling on page 63 of the report that the fact that the Surety Company was a re-insurer of the F. & D.'s obligations and that counsel for the receiver knew this fact is immaterial.

39. To the admission in evidence, over the Surety Company's objection, and subject to its exception, of evidence as to the agreement of settlement between the receiver and the F. & D.

40. To the conclusions, stated on page 66 of the report, "that all of these bonds are binding obligations on the Surety Company and that there is therefore no ground upon which they can be cancelled", and that the Surety Company is indebted to the receiver in the amounts and upon the bonds therein named.

41. To the recommendation that as to the prayers of the Surety Company all bills in equity should be dismissed; that in the three cases named a decree should be entered ordering the Surety Company to pay to the receiver the amounts specified; and that in the law cases numbered 5316 and 5317 judgment should be entered for the plaintiff in the amounts specified.

STANDARD SURETY & CASUALTY COMPANY
OF NEW YORK,
by their Attorneys,
FREDERIC H. CHASE,
RAYMOND P. BALDWIN.

This cause was thence continued to the September Term, A. D. 1935, when, to wit, October 10, 1935, said cause was set down for hearing on the above exceptions to report of auditor and master, the Honorable Hugh D. McLellan, District Judge, sitting.

Said cause was thence continued under advisement to the present March Term, A. D. 1936, when, to wit, March 18, 1936, a memorandum in connection with exceptions to master's and auditor's report is filed ruling that the exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver be sustained and that all other exceptions of both parties be overruled; that judgment be entered for the defendant in law actions Nos. 5225, 5316 and 5317 and that decrees for the cancellation of the bonds and the dismissing of the counterclaims be entered.

On the twenty-third day of March, A. D. 1936, the following Memorandum and Order is filed:

MEMORANDUM AND ORDER.

March 23, 1936.

Law No. 5225, Law No. 5316, Law No. 5317.

McLELLAN, J. Whereas, on March 18, 1936, a memorandum of decision applicable to the above-entitled law actions, and also to certain suits in equity between the same parties, was entered, and the plaintiff in the above law actions now seeks an opportunity for the taking of exceptions in the course of the trial of these actions, and the court is desirous that such an opportunity shall be afforded to him, it is ordered, as follows:

The order of March 18, 1936, overruling the plaintiff's and defendant's exceptions to the master's and auditor's report and ordering judgment for the defendant in the law actions, so far only as said order applies to the law actions, is vacated and set aside, and the trial of these cases continued to 12:30 P. M. this day.

On the twenty-third day of March, A. D. 1936 the following Memorandum and Order is entered overruling plaintiff's exceptions to the master's and auditor's report, plaintiff's exception thereto saved and to the ruling of the court that the action could not be main-

tained; defendant's exceptions to the master's and auditor's report to be overruled so far as they relate to the law actions except as indicated in the order of March 18, 1936, defendant's exception thereto being saved and judgment to be entered for the defendant.

MEMORANDUM AND ORDER.

March 23, 1936.

Law No. 5225, Law No. 5316, Law No. 5317.

McLELLAN J. At 12:30 P. M. on this twenty-third day of March, 1936, a continued hearing of the above law actions was held.

Subject to the plaintiff's exception, I overruled the plaintiff's exceptions to the master's and auditor's report, and subject also to the plaintiff's exception, I ruled that the above actions could not be maintained.

Subject to the defendant's exception, I overruled the defendant's exceptions to the master's and auditor's report, so far as they relate to the above law actions, except as indicated in the order of March 18, 1936, on file.

Let judgment be entered for the defendant in each of the above-entitled actions.

On the twenty-ninth day of April, 1936, the following stipulation *re* incorporating master's and auditor's report by reference into the bill of exceptions is filed:

STIPULATION.

April 29, 1936.

Law No. 5225, Law No. 5316, Law No. 5317.

In the above-entitled actions it is stipulated and agreed that the master's and auditor's report filed on June 6, 1935, may be incorporated by reference into the bills of exceptions of the respective parties, and made a part of the record in said cases.

GOODWIN, PROCTER & HOAR,

Attorneys for the Plaintiff.

STEWART & CHASE,

Attorneys for the Defendant.

On the thirtieth day of April, A. D. 1936, draft bills of exceptions are filed by the plaintiff and the defendant within extended time.

On the eighteenth day of June, A. D. 1936, the aforementioned plaintiff's and defendant's bills of exceptions are allowed by the court, the Honorable Hugh D. McLellan, District Judge, sitting.

On the said eighteenth day of June, A. D. 1936, the following Defendant's Motion for the Entry of Judgment is filed by consent and allowed by the court:

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT.
[Filed and allowed June 18, 1936.]

Now comes the defendant Standard Surety & Casualty Company of New York and moves that judgment for this defendant be entered forthwith.

By its Attorneys,

STEWART & CHASE,
by FREDERIC H. CHASE.
RAYMOND BALDWIN.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

Thereupon, to wit, June 18, 1936, it is considered by the court, the Honorable Hugh D. McLellan, District Judge, sitting, that Standard Surety & Casualty Company of New York, defendant, recover of the said Frederick S. Deitrick, receiver of the Boston-Continental National Bank, its costs of suit taxed at

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MEMORANDUM.
March 18, 1936.

Equity No. 3849, Equity No. 3850, Equity No. 3851, Equity No. 3852.
Law No. 5225, Law No. 5316, Law No. 5317.

MCLELLAN, J. These seven cases were referred to W. Barton Leach, Esquire, as master and auditor. By stipulation, his findings of fact as auditor are final.

As stated by the master and auditor, these seven cases raise the question whether the Standard Surety & Casualty Company of New York is liable to the receiver of the Boston-Continental National Bank upon four bonds written in the name of the Surety Company by its attorney-in-fact, Percy G. Cliff. The bonds purported to guarantee payment respectively of a note of $20,000 made by Arthur D. Cronin, a note of $40,000 made by Westchester Discount Corporation, a note of $52,000 made by Joseph Stone and a note of $20,000 made by Gordon A. Robinson. In the four equity cases the Surety Company seeks to have the bonds cancelled; the receiver counterclaims upon the bonds. The three law cases are actions by the receiver upon the Westchester, Stone and Robinson bonds. Amendments of the pleadings have made the issues raised in the law and equity cases identical.

The facts appear in the master's and auditor's report and need not be repeated here. Upon these facts the bonds did not constitute valid obligations of the Standard Surety & Casualty Company and could not have been enforced by the Boston-Continental National Bank. The master's and auditor's view that they were enforceable by the receiver is persuasive and sustained by authorities in several jurisdictions. These cases are cited and discussed in the report. See also *Texas and Pacific Railway Company* v. *Pottorff*, 291 U. S. 245. But I feel bound by *Rankin* v. *City National Bank*, 208 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank. In *McCandless, Receiver,* v. *Furlaud et als.,* 296 U. S. 140, decided by the Supreme Court of the United States on November 11, 1935, since the filing of the master's and auditor's report, a majority of the court declined to consider whether the receivership corporation would have been entitled to the relief afforded in that case to the receiver. The minority opinion of the four dissenting judges, written by Mr. Justice Roberts, is consistent with the view expressed in the *Rankin* case.

The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained, and all other exceptions of both parties are overruled.

In the law actions, Nos. 5225, 5316 and 5317, judgment is to be entered for the defendant.

In the equity suits, Nos. 3849, 3850, 3851 and 3852, decrees for the cancellation of the bonds and dismissing the counterclaims are to be entered.

PLAINTIFF'S BILL OF EXCEPTIONS.

[Filed April 30, 1936 and allowed June 18, 1936.]

This action is brought by the present receiver of the Boston-Continental National Bank against the Standard Surety and Casualty Company of New York to recover on a bond purporting to be executed by the Surety Company.

The successive receivers of the Boston-Continental National Bank have been John B. Cunningham, James H. Brennan and Frederick S. Deitrick. At the time suit was brought John B. Cunningham was receiver. Subsequent receivers have been substituted as parties from time to time. All formalities with respect to such substitution have been complied with. All of the pleadings may be referred to and are made a part hereof by reference.

DESCRIPTION OF THE CASE.

This is a suit by a receiver of a national bank to recover on a bond in the amount of $40,000, executed by Standard Surety and Casualty Company of New York by its attorney-in-fact, Percy G. Cliff. This bond purports to guarantee an obligation of Westchester Discount Corporation. The writ and declaration were filed June 28, 1932. The amount claimed is $40,000 with interest from December 20, 1931.

PROCEDURAL HISTORY.

The parties in this case, by their attorneys of record, filed with the clerk a written stipulation waiving trial by jury and agreeing that this case could be tried simultaneously with two other actions at law pending between the same parties and numbered Law 5316 and 5317, and four bills in equity brought by Standard Surety and Casualty

Company of New York against Boston-Continental National Bank, its receivers and others, pending in this court and numbered Equity 3849, 3850, 3851 and 3852.

The four equity actions above referred to were suits by the Surety Company seeking the cancellation and surrender of four bonds, all written under similar circumstances, running to the Boston-Continental National Bank, and purporting to guarantee the obligations to that bank of four separate persons. In those equity actions the receiver counterclaimed upon the bond in each case. Actions at law were brought on three of the bonds which are the subject of the equity actions, one law action being the one here under consideration, and the other two being numbered Law 5316 and 5317. By order of the court entered February 4, 1935, and without objection of either party, all three of the law cases were referred to W. Barton Leach as auditor, with instructions to report to the court his findings of fact and conclusions of law; said findings of fact to be final. At the same time all four of the equity cases, by consent of the parties, were referred to Mr. Leach as master, with instructions to make findings of fact and conclusions of law in accordance with the equity rules. Extended hearings were had before the auditor, and after the conclusion thereof both parties presented in writing to the auditor requests for findings of fact and rulings of law. Before filing his final report the auditor submitted to each party a draft report, and received in writing from each party further suggestions with respect to the findings of fact and rulings of law.

On June 6, 1935, the auditor filed his report containing his findings of fact and conclusions of law.

Mr. Leach filed one report which was a combined auditor's and master's report, and accordingly it contains findings of fact and conclusions of law dealing with the so-called Robinson bond (Law No. 5316), Stone bond (Law No. 5317) and Cronin bond (not made the subject of an action at law).

On June 26, 1935, the defendant in this action filed forty-one exceptions to the combined report of the master and auditor.

On June 14, 1935, the receiver filed one exception to the auditor's

report excepting to the ruling of law of the auditor that the receiver could not recover on the Westchester bond or endorsements thereof.

On October 10, 1935, the case was argued by counsel before the court, but neither party at that time or subsequently presented to the court further requests for rulings of law.

On March 18, 1936, the court handed down a memorandum in the absence of counsel adopting the findings of fact by the auditor and overruling all exceptions to the auditor's report taken by both parties, except all exceptions of the defendant to the legal conclusion of the auditor that the bond was enforceable by the receiver and judgment for the defendant was ordered to be entered.

On March 23, 1936, the court, at the request of the plaintiff, vacated and set aside the order of March 18, 1936, in so far as the same dealt with the law actions, in order to give the plaintiff an opportunity to take exceptions in the course of the trial of these cases. Subsequently on the same day, in the presence of counsel for both parties, and subject to the plaintiff's exception, the court ruled that the three law actions could not be maintained by the receiver, and overruled the plaintiff's single exception to the legal conclusion of the auditor that the receiver could not recover on the Westchester bond, and subject to the defendant's exception the court overruled all exceptions of the defendant to the auditor's report, except those taken to the legal conclusion of the auditor that the bonds were enforceable by the receiver.

Statement of Facts.

All of the facts necessary to the consideration of this case have been specially found by the auditor, concisely and in detail, and specifically set forth, together with exhibits and all other matters pertinent thereto, in a report which has been filed with this Honorable Court. These findings of fact are made in connected narrative form, and are plainly segregated in the report from the conclusions of law drawn therefrom by the auditor. These findings of fact by the auditor are final by stipulation, and having been adopted by the court are special findings forming part of the record. Specific ref-

erence to the entire auditor's report is hereby made, and the same in its entirety as filed is hereby specifically incorporated herein by reference and may be referred to.

Rulings and Conclusions of Law Excepted to by the Plaintiff.

A memorandum filed by the court on March 18, 1936, contained the following rulings of law:

1. "Upon these facts the bonds do not constitute valid obligations of the Standard Surety and Casualty Company and could not have been enforced by the Boston-Continental National Bank."
2. "But I feel bound by *Rankin* v. *City National Bank,* 206 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank."
3. "The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained and all other exceptions of both parties are overruled."
4. "In the law actions numbered 5225, 5316 and 5317 judgment is to be entered for the defendant."

As above noted, on March 23, 1936, the order of March 18, 1936, in so far as it deals with the law actions was vacated and set aside, and on the same day the court

1. Ruled that the law actions could not be maintained.
2. Overruled the plaintiff's exception to the auditor's conclusion that the Westchester bond could not be enforced.
3. Ordered judgment to be entered for the defendant in each of the three law actions.

A.

PLAINTIFF'S EXCEPTION TO AUDITOR'S RULING OF LAW DENIED BY THE COURT.

Now comes the plaintiff in the above-entitled cause and files the following exceptions to the report of the auditor filed herein on June 6, 1935, to wit:

1. To the ruling of the auditor that the Westchester bond dated December 20, 1930, and "endorsements" do not secure payment of the note of forty thousand dollars ($40,000) of Westchester Discount Corporation dated December 23, 1930, and that there can be no recovery upon this bond and "endorsements". (Auditor's report, pages 40, 41 and 49.)

PLAINTIFF'S EXCEPTIONS.

The plaintiff during the course of the trial, and within the time required by law and the rules of this Honorable Court, duly excepted

(a) To the rulings of law made by the court above set forth;
(b) To the refusal of the court to sustain the exception of the plaintiff to the auditor's legal conclusion above set forth;
(c) To the orders for judgment for the defendant;

and all of said exceptions were duly saved by the court, and the plaintiff being aggrieved by these several rulings and orders for judgment, which were the subject of said exceptions, brings this bill of exceptions, and prays that it may be allowed.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
SAMUEL HOAR,
RICHARD M. NICHOLS.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

PLAINTIFF'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.

[Filed and allowed June 18, 1936.]

Now comes the plaintiff in the above-entitled case and moves that, for the purposes of the record on appeal herein, said case be forthwith consolidated with the companion cases tried herewith in this court entitled and numbered respectively as follows:

Law No. 5316.

Frederick S. Deitrick as he is Receiver of Boston Continental National Bank

v.

Standard Surety & Casualty Company of New York.

Law No. 5317.

Frederick S. Deitrick as he is Receiver of Boston Continental National Bank

v.

Standard Surety & Casualty Company of New York.

Equity No. 3849.

Standard Surety & Casualty Company of New York

v.

Boston Continental National Bank, Frederick S. Deitrick, Receiver of Boston Continental National Bank, and Joseph Stone.

Equity No. 3850.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

Equity No. 3851.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

Equity No. 3852.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

And that to make said consolidation effective, and to carry out the purposes thereof, a single petition for appeal be filed, and a single record on appeal be printed covering all of said cases.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS.

We assent to the allowance of the above motion.

STEWART & CHASE,
FREDERIC H. CHASE,
RAYMOND BALDWIN,
Attorneys for Standard Surety & Casualty Company of New York.

June 18, 1936. Allowed

HUGH D. MCLELLAN,
District Judge.

From the final judgments, entered in the three law actions, numbered respectively 5225, 5316 and 5317, and the final decrees entered in the four equity actions, numbered, respectively, 3849, 3850, 3851 and 3852, the receiver of the Boston-Continental National Bank, Frederick S. Deitrick, claims an appeal to the United States Circuit Court of Appeals for the First Circuit on the eleventh day of September, 1936, and said appeal is allowed by the court on the same day.

RECEIVER'S ASSIGNMENT OF ERRORS.

[Filed September 11, 1936.]

No. 5225 Law.

Frederick S. Deitrick as he is Receiver of Boston-Continental National Bank

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick as he is Receiver of Boston-Continental National Bank

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick as he is Receiver of Boston-Continental National Bank

v.

Standard Surety & Casualty Company of New York.

No. 3849 Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

No. 3850 Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

Now comes Frederick S. Deitrick as he is receiver of the Boston-Continental National Bank and, in connection with his petition for appeal in the above-entitled actions (consolidated for the purpose of appeal), makes the following assignment of errors, which he states occurred upon the trial of the cases in the United States District Court for the District of Massachusetts, to wit:

1. In the three actions at law, numbered respectively 5225, 5316 and 5317, the court erred in entering judgment for the defendant upon the facts found.

2. In the four causes in equity, numbered respectively 3849, 3850, 3851 and 3852, the court, upon the facts found, erred in entering final decrees declaring the several bonds and endorsements referred to in said decrees to be void and unenforceable, and enjoining said receiver and said Boston-Continental National Bank from enforcing the same.

3. In the four causes in equity, numbered respectively 3849, 3850, 3851 and 3852, the court, upon the facts found, erred in entering final decrees dismissing said receiver's counterclaim in each case.

4. The court, upon the facts found, erred in ruling as follows:

(a) "Upon these facts the bonds do not constitute valid obligations of the Standard Surety & Casualty Company and could not have been enforced by the Boston-Continental National Bank."

(b) "I feel bound by *Rankin* v. *City National Bank*, 206 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank."

(c) "The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained . . . ",

(d) That the actions at law, numbered 5225, 5316 and 5317, could not be maintained.

5. In action at law numbered 5225 and in equity case numbered 3851 the court, upon the facts found, erred in overruling the receiver's exception to rulings of the master and auditor that the Westchester bond dated December 20, 1930, and "endorsements" do not

secure payment of the note of forty thousand dollars ($40,000) of Westchester Discount Corporation dated December 23, 1930, and that there can be no recovery upon this bond and "endorsements".

6. The court, upon the facts found, erred in ruling that if the Boston-Continental National Bank could not recover on the bonds and endorsements in suit the receiver of the Boston-Continental National Bank could not recover.

Wherefore the receiver prays that the judgment of the District Court may be reversed.

By his Attorneys,

GOODWIN, PROCTER & HOAR.

A citation on appeal was issued on the eleventh day of September, A. D. 1936, on behalf of Frederick S. Deitrick, as receiver, in the three law cases, numbered 5225, 5316 and 5317, and in the four equity cases, numbered 3849, 3850, 3851 and 3852, said citation being made returnable in the United States Circuit Court of Appeals on October 13, 1936. Service of said citation was duly acknowledged.

No. 5316 LAW DOCKET.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank (Substituted for John B. Cunningham, Receiver), Plaintiff,

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE, Defendants.

WRIT.

UNITED STATES OF AMERICA.

[SEAL] MASSACHUSETTS DISTRICT, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts or his Deputy, GREETING:

We command you to attach the goods and estate of Standard Surety & Casualty Company of New York, a corporation duly organ-

ized by law and having an usual place of business in Boston, Suffolk County, Massachusetts, to the value of thirty thousand dollars, and summon the said defendant (if it may be found in your District) to appear before our judge of our District Court, next to be holden at Boston, within and for our District of Massachusetts, on the second Tuesday of September next: then and there, in our said Court, to answer unto John B. Cunningham, as he is receiver of Boston-Continental National Bank, a national banking association duly organized by law and having an usual place of business in said Boston, plaintiff

To the damage of the said plaintiff (as he says) the sum of thirty thousand dollars, which shall then and there be made to appear with other due damages. And whereas the said plaintiff says that the said defendant has not in its own hands and possession, goods and estate to the value of thirty thousand dollars aforesaid, which can be come at to be attached; but has entrusted to, and deposited in the hands and possession of The First National Bank of Boston, a national banking association duly organized by law and having an usual place of business in said Boston, trustee of the said defendant's goods, effects, and credits, to the said value: We command you, therefore, that you summon the said The First National Bank of Boston (if it may be found in your district) to appear before our judge of our said Court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against its goods, effects, or credits, in the hands and possession of the said The First National Bank of Boston, and have you there this writ, with your doings therein.

Witness, the Honorable JAMES A. LOWELL, at Boston, the eleventh day of August in the year of our Lord one thousand nine hundred and thirty-two.

JAMES S. ALLEN, *Clerk,*
by EDITH G. ROLLINS, *Deputy Clerk.*

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA,

MASSACHUSETTS DISTRICT, ss. BOSTON, August 16, 1932.

Pursuant hereunto I have this day attached a chip as the property of the within named Standard Surety and Casualty Company of New York, And thereafter on the same day at 1:59 P. M. I summoned the within named The First National Bank of Boston, to appear at court as within directed, by giving in hand to B. D. Blaisdell, cashier, and in charge of its business thereof at Boston, in said District, a true and attested copy of the within Writ, and thereafter on the same day I summoned the within defendant, Standard Surety & Casualty Company of New York, to appear at court and answer as within directed by giving in hand to Merton L. Brown, Commissioner of Insurance for the Commonwealth of Massachusetts, duplicate copies of this writ, together with $2 his statutory fee for acceptance of service.

WILLIAM J. KEVILLE, *United States Marshal.*

by JOHN J. CARENS; *Deputy.*

The writ in this cause was duly entered at the September Term of this court, A. D. 1932, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, September 13, 1932, the following Declaration was filed:

DECLARATION.

[Filed September 13, 1932.]

Now comes the plaintiff in the above-entitled action and says that on December 22, 1931, he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States; that he duly qualified and is now acting as such receiver.

And the plaintiff says that the defendant duly entered into, executed under seal and delivered to the Boston-Continental National Bank, a national banking association duly organized by law, with an usual place of business in Boston, in said District, a written instrument or bond, copy whereof, is hereto annexed marked "A" and

hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay said Boston-Continental National Bank the sum of $20,000 in the event that Gordon A. Robinson of Boston in said District, failed to make full and true payment to said Boston-Continental National Bank of note in the amount of $20,000 described in said bond; that the condition of said bond has been broken, in that Gordon A. Robinson, the principal named therein, has not paid the note described in said bond, according to its terms, except the sum of $1,003.15, and has not made such payment on or before July 8, 1932, but on the contrary has failed, refused and declined to pay said note and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said note; that the defendant was duly notified of the default in accordance with the provisions of the bond; that the damages sustained by the defendant on account of the default of said Gordon A. Robinson are in excess of $20,000.

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond, with interest from July 8, 1932.

And the plaintiff says that this is an action at law arising under the Constitution and the laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

A.

No. 12420-31 $20,000.00

Know all Men by these Presents, That we, Gordon A. Robinson of Boston in the County of Suffolk and the Commonwealth of Massachusetts, doing business as Robinson Engineering Company, as Principal, and the Standard Surety and Casualty Company of New York,

a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking Corporation duly organized under the laws of the United States of America and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of twenty thousand dollars ($20,000.00), to be paid to said Boston Continental National Bank as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if Gordon A. Robinson shall, within four months from date hereof, make to the Boston Continental National Bank, full and true payment of note in the amount of twenty thousand dollars ($20,000.00), maturing November eighth, nineteen hundred and thirty-one, or of any extension thereof, in whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, the obligee shall notify the Home Office of such Surety at 80 John Street, New York City, New York, within ten (10) days, by registered mail, of such default and the Surety Company shall, within thirty (30) days, pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default, four months from date hereof and in no event exceeding twenty thousand dollars ($20,000.00); the liability of the Surety with respect to any such extension or renewal, in no event to extend beyond date of July eighth, nineteen hundred thirty-two.

Witness our hands and seals and dated this eighth day of July A. D. 1931.

GORDON A. ROBINSON.
D/B as Robinson Engineering Co.
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff, Attorney-in-fact [SEAL]

At the same term, to wit, September 14, 1932 the following Answer of Trustee was filed:

TRUSTEE'S ANSWER.

[Filed September 14, 1932.]

[MEMORANDUM. Copy of trustee's answer is here omitted as it is identical with the one already printed in case No. 5225 Law, on page 10 of this volume with the exception of the phrase "subject to previous trustee attachment" appearing following the figures "$320.21" and preceding the word "and". JAMES S. ALLEN, *Clerk.*]

This cause was thence continued from term to term to the March term, A. D. 1933, when, to wit, May 4, 1933, the following Answer was filed late by consent:

DEFENDANT'S ANSWER.

[Filed by consent May 4, 1933.]

Now comes the defendant in the above-entitled cause without waiving its bill in equity heretofore filed and now pending before this Honorable Court, and for answer to the plaintiff's declaration says:

1. The defendant denies all the allegations in the plaintiff's declaration.

2. Further answering the defendant says that if any written instruments such as alleged in the declaration purporting to be executed in the name of the defendant by Percy G. Cliff as attorney-in-fact, have come into the hands of the plaintiff, the same were executed by said Cliff at the request and solicitation of said Boston-Continental National Bank without authority from this defendant as said bank well knew, without any consideration or security, without premiums charged or paid or intended to be charged or paid therefor, upon the understanding between said bank and said Cliff that said instruments were not binding obligations of the defendant, that the defendant should never be informed of the existence thereof, and that after remaining in the custody of said bank for a short time they should be returned to said Cliff.

3. And for further answer the defendant says that, prior to the date of the writ in this action, said Boston-Continental National Bank executed and delivered to said Cliff a release under seal, whereby for

the consideration therein expressed said bank discharged the claim sued upon in this action.

By its Attorneys,

STEWART & CHASE.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, December 6, 1934, the following Motion to Amend Defendant's Answer was filed:

MOTION TO AMEND DEFENDANT'S ANSWER.

[Filed December 6, 1934.]

Now comes the defendant, Standard Surety & Casualty Company of New York, in the above-entitled action and moves to amend its answer by inserting therein, after paragraph 3 thereof, the following:

"4. And for further answer, and as a bar to the plaintiff's action, the defendant says that subsequent to the filing of the defendant's original answer in this case, the plaintiff brought an action against Fidelity & Deposit Company of Maryland (No. 5498 Law) and there declared upon certain Bankers Blanket Bonds. The remedy sought by the plaintiff in said case against Fidelity & Deposit Company of Maryland was based upon the theory of his disaffirmance of the instrument upon the affirmance of which he seeks to recover from the defendant in the case at bar, the plaintiff there contending that said instrument was invalid and uncollectible as against this defendant; and said remedy and the theory upon which it was based, and said disaffirmance of said instrument were inconsistent with the remedy here sought. Said action by the plaintiff against said Fidelity & Deposit Company of Maryland was subsequently prosecuted and tried upon said inconsistent theory of disaffirmance, and on October 10, 1934, the parties there filed the following agreement for judgment:

> 'And now come the parties in the above-entitled action and agree that entries may be made of "judgment for the plaintiff for $100,000 without costs" and "judgment satisfied".'

Pursuant to said agreement judgment was entered for the plaintiff in said action in the amount of $100,000. Wherefore the defendant says that the plaintiff, by prosecuting said action to judgment, has

elected its remedy against Fidelity & Deposit Company of Maryland on the theory of his disaffirmance of the instrument theretofore declared upon by the plaintiff in this action, and that the plaintiff is barred by said election from recovery against the defendant in the case at bar on the inconsistent theory of the affirmance of said instrument; and that judgment herein should therefore be entered for the defendant."

By its Attorneys,

STEWART & CHASE.

At the same term, to wit, December 10, 1934, said cause came on to be heard on the motion to amend answer, the Honorable Hugh D. McLellan, District Judge, sitting, and the following Order of court allowing said motion was entered:

ORDER.

December 10, 1934.

December 10, 1934.

MCLELLAN, J. Without any intimation whatever as to the validity or invalidity of the alleged defence sought to be set up in the amendment, the within motion to amend defendant's answer is allowed.

HUGH D. MCLELLAN,

District Judge.

[MEMORANDUM. Inasmuch as the pleadings and recitals down to and including the master's and auditor's report are the same as those already printed on pages 25–129 in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the June Term, A. D. 1935, when, to wit, June 26, 1935, the following Defendant's Exceptions were filed:

DEFENDANT'S EXCEPTIONS TO REPORT OF MASTER AND AUDITOR.

[Filed June 26, 1935.]

[MEMORANDUM. See defendant's exceptions to report of master and auditor as printed on pages 130–136 in the case numbered 5225 Law. JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the pleadings and recitals down to and including the stipulation filed April 29, 1936, are the same as those already printed on pages 137, 138 in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk.*]

On the thirtieth day of April, A. D. 1936, draft bills of exceptions are filed by the plaintiff and the defendant within extended time.

On the eighteenth day of June, A. D. 1936, the aforementioned plaintiff's and defendant's bills of exceptions are allowed by the court, the Honorable Hugh D. McLellan, District Judge, sitting.

On the said eighteenth day of June, A. D. 1936, the following defendant's Motion for the Entry of judgment is filed by consent and allowed by the court:

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT.

[Filed and allowed June 18, 1936.]

Now comes the defendant Standard Surety & Casualty Company of New York and moves that judgment for this defendant be entered forthwith.

By its Attorneys,

STEWART & CHASE,
FREDERIC H. CHASE,
RAYMOND BALDWIN.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

Thereupon, to wit, June 18, 1936, it is considered by the court, the Honorable Hugh D. McLellan, District Judge, sitting, that Standard Surety & Casualty Company of New York, defendant, recover of the said Frederick S. Deitrick, receiver of the Boston-Continental National Bank, its costs of suit taxed at

MEMORANDUM.

March 18, 1936.

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

No. 3850 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

[MEMORANDUM. Copy of memorandum is here omitted, as it already appears printed on pages 139–141 of this volume in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

PLAINTIFF'S BILL OF EXCEPTIONS.

[Filed April 30, 1936 and allowed June 18, 1936.]

This action is brought by the present receiver of the Boston-Continental National Bank against the Standard Surety and Casualty Company of New York to recover on a bond purporting to be executed by the Surety Company.

The successive receivers of the Boston-Continental National Bank have been John B. Cunningham, James H. Brennan and Frederick S. Deitrick. At the time suit was brought John B. Cunningham was receiver. Subsequent receivers have been substituted as parties from time to time. All formalities with respect to such substitution have been complied with. All of the pleadings may be referred to and are made a part hereof by reference.

DESCRIPTION OF THE CASE.

This is a suit by a receiver of a national bank to recover on a bond in the amount of $20,000, executed by Standard Surety and Casualty Company of New York by its attorney-in-fact, Percy G. Cliff. This bond purports to guarantee an obligation of Gordon A. Robinson. The writ and declaration were filed September 13, 1932. The amount claimed is $14,403.53 with interest from August 10, 1932.

PROCEDURAL HISTORY.

The parties in this case, by their attorneys of record, filed with the clerk a written stipulation waiving trial by jury and agreeing that this case could be tried simultaneously with two other actions at law pending between the same parties and numbered Law 5225 and 5317, and four bills in equity brought by Standard Surety and Casualty Company of New York against Boston-Continental National Bank, its receivers and others, pending in this court and numbered Equity 3849, 3850, 3851 and 3852.

The four equity actions above referred to were suits by the Surety

Company seeking the cancellation and surrender of four bonds, all written under similar circumstances, running to the Boston-Continental National Bank, and purporting to guarantee the obligations to that bank of four separate persons. In those equity actions the receiver counterclaimed upon the bond in each case. Actions at law were brought on three of the bonds which are the subject of the equity actions, one law action being the one here under consideration, and the other two being numbered Law 5225 and 5317. By order of the court entered February 4, 1935, and without objection of either party, all three of the law cases were referred to W. Barton Leach as auditor, with instructions to report to the court his findings of fact and conclusions of law; said findings of fact to be final. At the same time all four of the equity cases, by consent of the parties, were referred to Mr. Leach as master, with instructions to make findings of fact and conclusions of law in accordance with the equity rules. Extended hearings were had before the auditor, and after the conclusion thereof both parties presented in writing to the auditor requests for findings of fact and rulings of law. Before filing his final report the auditor submitted to each party a draft report, and received in writing from each party further suggestions with respect to the findings of fact and rulings of law.

On June 6, 1935, the auditor filed a report containing his findings of fact and conclusions of law. This was a combined auditor's and master's report, and accordingly it contains findings of fact and conclusions of law dealing with the so-called Westchester bond (Law No. 5225), Stone bond (Law No. 5317) and Cronin bond (not made the subject of an action at law).

On June 26, 1935, the defendant in this action filed forty-one exceptions to the combined report of the master and auditor.

On October 10, 1935, the case was argued by counsel before the court, but neither party at that time or subsequently presented to the court further requests for rulings of law.

On March 18, 1936, the court handed down a memorandum in the absence of counsel adopting the findings of fact by the auditor and overruling all exceptions to the auditor's report taken by both parties, except all exceptions of the defendant to the legal conclusion of the

auditor that the bond was enforceable by the receiver and judgment for the defendant was ordered to be entered.

On March 23, 1936, the court, at the request of the plaintiff, vacated and set aside the order of March 18, 1936, in so far as the same dealt with the law actions, in order to give the plaintiff an opportunity to take exceptions in the course of the trial of these cases. Subsequently on the same day, in the presence of counsel for both parties and subject to the plaintiff's exception, the court ruled that the three law actions could not be maintained by the receiver, and overruled the plaintiff's single exception to the legal conclusion of the auditor that the receiver could not recover on the Westchester bond, and subject to the defendant's exception the court overruled all exceptions of the defendant to the auditor's report, except those taken to the legal conclusion of the auditor that the bonds were enforceable by the receiver.

Statement of Facts.

All of the facts necessary to the consideration of this case have been specially found by the auditor, concisely and in detail, and specifically set forth, together with exhibits and all other matters pertinent thereto, in a report which has been filed with this Honorable Court. These findings of fact are made in connected narrative form, and are plainly segregated in the report from the conclusions of law drawn therefrom by the auditor. These findings of fact by the auditor are final by stipulation, and having been adopted by the court are special findings forming part of the record. Specific reference to the entire auditor's report is hereby made, and the same in its entirety as filed is hereby specifically incorporated herein by reference and may be referred to.

Rulings and Conclusions of Law Excepted to by the Plaintiff.

A memorandum filed by the court on March 18, 1936, contained the following rulings of law:

1. "Upon these facts the bonds do not constitute valid obligations of the Standard Surety and Casualty Company and

could not have been enforced by the Boston-Continental National Bank."

2. "But I feel bound by *Rankin* v. *City National Bank*, 206 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank."
3. "The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained and all other exceptions of both parties are overruled."
4. "In the law actions numbered 5225, 5316 and 5317 judgment is to be entered for the defendant."

As above noted, on March 23, 1936, the order of March 18, 1936, in so far as it deals with the law actions, was vacated and set aside, and on the same day the court

1. Ruled that the law actions could not be maintained.
2. Ordered judgment to be entered for the defendant in each of the three law actions.

PLAINTIFF'S EXCEPTIONS.

The plaintiff during the course of the trial, and within the time required by law and the rules of this Honorable Court, duly excepted

(a) To the rulings of law made by the court above set forth;

(b) To the orders for judgment for the defendant; and all of said exceptions were duly saved by the court, and the plaintiff being aggrieved by these several rulings and orders for judgment, which were the subject of said exceptions, brings this bill of exceptions, and prays that it may be allowed.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
SAMUEL HOAR,
RICHARD M. NICHOLS.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

PLAINTIFF'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.

[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it will be found printed on pages 146, 147 of this volume, in case No. 5225 Law. JAMES S. ALLEN, *Clerk*.]

No. 5317, LAW DOCKET.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank (Substituted for John B. Cunningham, Receiver) Plaintiff,

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE, Defendants.

WRIT.

UNITED STATES OF AMERICA.

[SEAL] MASSACHUSETTS DISTRICT, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts, or his Deputy, GREETING:

We command you to attach the goods and estate of Standard Surety & Casualty Company of New York, a corporation duly organized by law and having an usual place of business in Boston, Suffolk County, Massachusetts, to the value of seventy-five thousand dollars, and summon the said defendant (if it may be found in your district) to appear before our judge of our District Court, next to be holden at Boston, within and for our District of Massachusetts, on the second Tuesday of September next: then and there, in our said court, to answer unto John B. Cunningham, as he is receiver of Boston-Continental National Bank, a national banking association duly organized by law and having an usual place of business in said Boston, plaintiff.

To the damage of the said plaintiff (as he says) the sum of seventy-five thousand dollars, which shall then and there be made to

appear with other due damages. And whereas the said plaintiff says that the said defendant has not in its own hands and possession, goods and estate to the value of seventy-five thousand dollars aforesaid, which can be come at to be attached; but has entrusted to and deposited in the hands and possession of The First National Bank of Boston, a national banking association duly organized by law and having an usual place of business in said Boston, trustee of the said defendant's goods, effects, and credits, to the said value: We command you, therefore, that you summon the said The First National Bank of Boston (if it may be found in your district) to appear before our judge of our said court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against its goods, effects, or credits, in the hands and possession of the said The First National Bank of Boston, and have you there this writ, with your doings therein.

Witness, the Honorable JAMES A. LOWELL, at Boston, the eleventh day of August in the year of our Lord one thousand nine hundred and thirty-two.

JAMES S. ALLEN, *Clerk*,
by EDITH G. ROLLINS, *Deputy Clerk*.

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss. BOSTON, August 16, 1932.

Pursuant hereunto I have this day attached a chip as the property of the within named Standard Surety and Casualty Company of New York, and thereafter on the same day at 1:58 P. M. I summoned the within named The First National Bank of Boston, to appear at court as within directed, by giving in hand to B. D. Blaisdell, Cashier, and in charge of its business thereof at Boston, in said district, a true and attested copy of the within writ, and thereafter on the same day I summoned the within defendant Standard Surety & Casualty Company of New York to appear at court and answer as within directed by giving in hand to Merton L. Brown, Commissioner of Insurance

for the Commonwealth of Massachusetts, duplicate copies of this writ, together with $2, his statutory fee for acceptance of service.

W. J. KEVILLE, *United States Marshal,*
by JOHN J. CARENS, *Deputy United States Marshal.*

The writ in this cause was duly entered at the September Term of this court, A. D. 1932, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, September 13, 1932, the following Declaration was filed:

DECLARATION.

[Filed September 13, 1932.]

Now comes the plaintiff in the above-entitled action and says that on December 22, 1931 he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States; that he duly qualified and is now acting as such receiver.

And the plaintiff says that the defendant duly entered into, executed under seal and delivered to the Boston-Continental National Bank, a national banking association duly organized by law, with an usual place of business in Boston, a written instrument or bond, copy whereof is hereto annexed marked "A" and hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay Boston-Continental National Bank the sum of $52,000 in the event that Joseph Stone, of Brockton in said District, failed within one year from the date of the bond, to wit, June 2, 1931, to make full and true payment to the Boston-Continental National Bank of an obligation in the sum of $52,000; that the condition of said bond as aforesaid has been broken, in that Joseph Stone, the principal named therein, has not paid the obligation described in said bond, according to its terms, except the sum of $237.31, but on the contrary has failed, refused and declined to pay said obligation and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said obligation; that the defendant was duly notified of the default in accordance with the provisions of the bond;

that the damages sustained by the defendant on account of the default of said Joseph Stone are in excess of $52,000.

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond, with interest from June 2, 1931.

And the plaintiff says that this is an action at law arising under the Constitution and the laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

A.

No. 9485-31 6/2/32 $52,000.00

Know all Men by these Presents, That we, Joseph Stone of Brockton, Massachusetts, as Principal, and the Standard Surety & Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking Corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of fifty-two thousand dollars ($52,000.00), to be paid to said Boston Continental National Bank as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Joseph Stone shall, within one year from this date, make to the Boston Continental National Bank, full and true payment of an obligation in the sum of fifty-two thousand dollars ($52,000.00), then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, one year from this date, the obligee shall notify the Home Office of the said Surety

Company at 80 John Street, New York City, New York, within ten days by registered mail of such default and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid obligation of fifty-two thousand dollars ($52,000.00), said payment to be made by the Surety Company within thirty days after the receipt by the Surety Company of the notice of default.

Witness our hands and seals, and dated this 2nd day of June, A. D. 1931.

JOSEPH STONE [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

by Percy G. Cliff Attorney-in-fact.

This cause was thence continued from term to term to the March Term, A. D. 1933, when, to wit, May 4, 1933, the following Defendant's Answer was filed late by consent:

DEFENDANT'S ANSWER.

[Filed by consent May 4, 1933.]

Now comes the defendant in the above-entitled cause without waiving its bill in equity heretofore filed and now pending before this Honorable Court, and for answer to the plaintiff's declaration says:

1. The defendant denies all the allegations in the plaintiff's declaration.

2. Further answering the defendant says that if any written instruments such as alleged in the declaration purporting to be executed in the name of the defendant by Percy G. Cliff as attorney-in-fact, have come into the hands of the plaintiff, the same were executed by said Cliff at the request and solicitation of said Boston-Continental National Bank without authority from this defendant as said bank well knew, without any consideration or security, without premiums charged or paid or intended to be charged or paid therefor, upon the understanding between said bank and said Cliff that said instruments were not binding obligations of the defendant, that the defendant should never be informed of the existence thereof, and that after remaining in the custody of said bank for a short time they should be returned to said Cliff.

3. And for further answer the defendant says that prior to the date of the writ in this action, to wit, on or about June 4, 1931, said Boston-Continental National Bank executed and delivered to said Cliff a release dated June 4, 1931, a copy of which is hereto annexed, whereby for the consideration therein expressed said bank discharged the claim sued upon in this action.

By its Attorneys,

STEWART & CHASE.

RELEASE.

Whereas, on the second day of June, nineteen hundred thirty-one, Joseph Stone, of Brockton in the County of Plymouth and the Commonwealth of Massachusetts, as Principal and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, did execute a bond to the Boston Continental National Bank, wherein the said Joseph Stone as Principal and the Standard Surety & Casualty Company, as Surety, did bind themselves to the said Boston Continental National Bank in the sum of fifty-two thousand dollars ($52,000.00) to be paid to said Boston Continental National Bank in the event that the said Joseph Stone should not, within one year from the date hereof, fully pay and discharge to the said Boston Continental National Bank, the sum of fifty-two thousand dollars ($52,000.00).

And whereas said Joseph Stone has fully paid and discharged his obligation, now therefore, in consideration of the premises and of one dollar ($1.00) in hand, well and truly paid by said Surety Company to said Boston Continental National Bank, receipt of which is hereby acknowledged, said Boston Continental National Bank does hereby forever discharge, release and hold harmless, the said Surety Company from any liability whatsoever under, or in connection with said Bond.

In witness whereof, said Boston Continental National Bank has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this fourth day of June, nineteen hundred and thirty-one.

BOSTON CONTINENTAL NATIONAL BANK
By T. M. Ragan, President.

Signed, sealed and delivered in the presence of
Witness.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, December 6, 1934, the following Motion to Amend Defendant's Answer was filed:

MOTION TO AMEND DEFENDANT'S ANSWER.
[Filed December 6, 1934.]

Now comes the defendant Standard Surety & Casualty Company of New York in the above-entitled action and moves to amend its answer by inserting therein, after paragraph 3 thereof, the following:

"4. And for further answer, and as a bar to the plaintiff's action, the defendant says that subsequent to the filing of the defendant's original answer in this case, the plaintiff brought an action against Fidelity & Deposit Company of Maryland (No. 5498 Law) and there declared upon certain Bankers Blanket Bonds. The remedy sought by the plaintiff in said case against Fidelity & Deposit Company of Maryland was based upon the theory of his disaffirmance of the instrument upon the affirmance of which he seeks to recover from the defendant in the case at bar, the plaintiff there contending that said instrument was invalid and uncollectible as against this defendant, and said remedy and the theory upon which it was based, and said disaffirmance of said instrument were inconsistent with the remedy here sought. Said action by the plaintiff against said Fidelity & Deposit Company of Maryland was subsequently prosecuted and tried upon said inconsistent theory of disaffirmance, and on October 10, 1934, the parties there filed the following agreement for judgment:

> 'And now come the parties in the above entitled action and agree that entries may be made of "judgment for the Plaintiff for $100,000 without costs" and "Judgment Satisfied".'

Pursuant to said agreement judgment was entered for the plaintiff in said action in the amount of $100,000. Wherefore the defendant says that the plaintiff, by prosecuting said action to judgment, has elected its remedy against Fidelity & Deposit Company of Maryland on the theory of his disaffirmance of the instrument theretofore declared upon by the plaintiff in this action, and that the plaintiff is barred by said election from recovery against the defendant in the case at bar on the inconsistent theory of the affirmance of said instrument; and that judgment herein should therefore be entered for the defendant."

By its Attorneys,

STEWART & CHASE.

At the same term, to wit, December 10, 1934, said cause came on to be heard on the motion to amend answer, the Honorable Hugh D. McLellan, District Judge, sitting, and the following Order of court allowing said motion was entered:

ORDER.

December 10, 1934.

December 10, 1934.

McLELLAN, J. Without any intimation whatever as to the validity or invalidity of the alleged defence sought to be set up in the amendment, the within motion to amend defendant's answer is allowed.

HUGH D. McLELLAN,

District Judge.

[MEMORANDUM. Inasmuch as the pleadings and recitals down to and including the master's and auditor's report are the same as those already printed on pages 25–129 in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the June Term, A. D. 1935, when, to wit, June 26, 1935, the following Defendant's Exceptions to Auditor's Report was filed:

DEFENDANT'S EXCEPTIONS TO REPORT OF MASTER AND AUDITOR.

[Filed June 26, 1935.]

[MEMORANDUM. See defendant's exceptions to report of master and auditor as printed on pages 130–136 in the case numbered 5225 Law. . JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the pleadings and recitals down to and including the stipulation filed April 29, 1936, are the same as those already printed on pages 137, 138 in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk.*]

On the thirtieth day of April, A. D. 1936, draft bills of exceptions are filed by the plaintiff and the defendant within extended time.

On the third day of June, A. D. 1936, the following Trustee's Answer is filed late by consent:

TRUSTEE'S ANSWER.

[Filed by consent June 3, 1936.]

[MEMORANDUM. Copy of trustee's answer is here omitted as it is identical with the one already printed in case No. 5225 Law, on page 10 of this volume with the exception of the phrase "subject to previous trustee attachment appearing following the figures $320.-21" and preceding the word "and". JAMES S. ALLEN, *Clerk.*]

On the eighteenth day of June, A. D. 1936, the aforementioned plaintiff's and defendant's bills of exceptions are allowed by the court, the Honorable Hugh D. McLellan, District Judge, sitting.

On the said eighteenth day of June, A. D. 1936, the following Defendant's Motion for the Entry of Judgment is filed by consent and allowed by the court.

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT.

[Filed and allowed June 18, 1936.]

Now comes the defendant Standard Surety & Casualty Company

of New York and moves that judgment for this defendant be entered forthwith.

By its Attorneys,

STEWART & CHASE,
FREDERIC H. CHASE,
RAYMOND BALDWIN.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

Thereupon, to wit, June 18, 1936, it is considered by the court, the Honorable Hugh D. McLellan, District Judge, sitting, that Standard Surety & Casualty Company of New York, defendant, recover of the said Frederick S. Deitrick, receiver of the Boston-Continental National Bank, its costs of suit taxed at

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MEMORANDUM.

March 18, 1936.

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

No. 3850 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

[MEMORANDUM. Copy of memorandum is here omitted, as it already appears printed on pages 139–141 of this volume, in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

PLAINTIFF'S BILL OF EXCEPTIONS.

[Filed April 30, 1936, Allowed June 18, 1936.]

This action is brought by the present receiver of the Boston-Continental National Bank against the Standard Surety & Casualty Company of New York to recover on a bond purporting to be executed by the Surety Company.

The successive receivers of the Boston-Continental National Bank have been John B. Cunningham, James H. Brennan and Frederick S. Deitrick. At the time suit was brought John B. Cunningham was receiver. Subsequent receivers have been substituted as parties from time to time. All formalities with respect to such substitution have been complied with. All of the pleadings may be referred to and are made a part hereof by reference.

DESCRIPTION OF THE CASE.

This is a suit by a receiver of a national bank to recover on a bond in the amount of $52,000, executed by Standard Surety & Casualty

Company of New York by its attorney-in-fact, Perry G. Cliff. This bond purports to guarantee an obligation of Joseph Stone. The writ and declaration were filed September 13, 1932. The amount claimed is $52,000 with interest from July 30, 1932.

PROCEDURAL HISTORY.

The parties in this case, by their attorneys of record, filed with the clerk a written stipulation waiving trial by jury and agreeing that this case could be tried simultaneously with two other actions at law pending between the same parties and numbered Law 5225 and 5316, and four bills in equity brought by Standard Surety and Casualty Company of New York against Boston-Continental National Bank, its receivers and others, pending in this court and numbered equity 3849, 3850, 3851 and 3852.

The four equity actions above referred to were suits by the Surety Company seeking the cancellation and surrender of four bonds, all written under similar circumstances, running to the Boston-Continental National Bank, and purporting to guarantee the obligations to that bank of four separate persons. In those equity actions the receiver counterclaimed upon the bond in each case. Actions at law were brought on three of the bonds which are the subject of the equity actions, one law action being the one here under consideration, and the other two being numbered law 5225 and 5316. By order of the court entered February 4, 1935, and without objection of either party, all three of the law cases were referred to W. Barton Leach as auditor, with instructions to report to the court his findings of fact and conclusions of law; said findings of fact to be final. At the same time all four of the equity cases, by consent of the parties, were referred to Mr. Leach as master, with instructions to make findings of fact and conclusions of law in accordance with the equity rules. Extended hearings were had before the auditor, and after the conclusion thereof both parties presented in writing to the auditor requests for findings of fact and rulings of law. Before filing his final report the auditor submitted to each party a draft report, and received in writing from each party further suggestions with respect to the findings of fact and rulings of law.

On June 6, 1935, the auditor filed a report containing his findings of fact and conclusions of law. This was a combined auditor's and master's report, and accordingly it contains findings of fact and conclusions of law dealing with the so-called Westchester bond (Law No. 5225) Robinson bond (Law No. 5316) and Cronin bond (not made the subject of an action at law).

On June 26, 1935, the defendant in this action filed forty-one exceptions to the combined report of the master and auditor.

On October 10, 1935, the case was argued by counsel before the court, but neither party at that time or subsequently presented to the court further requests for rulings of law.

On March 18, 1936, the court handed down a memorandum in the absence of counsel adopting the findings of fact by the auditor and overruling all exceptions to the auditor's report taken by both parties, except all exceptions of the defendant to the legal conclusion of the auditor that the bond was enforceable by the receiver and judgment for the defendant was ordered to be entered.

On March 23, 1936, the court, at the request of the plaintiff, vacated and set aside the order of March 18, 1936, in so far as the same dealt with the law actions, in order to give the plaintiff an opportunity to take exceptions in the course of the trial of these cases. Subsequently on the same day, in the presence of counsel for both parties, and subject to the plaintiff's exception, the court ruled that the three law actions could not be maintained by the receiver, and overruled the plaintiff's single exception to the legal conclusion of the auditor that the receiver could not recover on the Westchester bond, and subject to the defendant's exception the court overruled all exceptions of the defendant to the auditor's report, except those taken to the legal conclusion of the auditor that the bonds were enforceable by the receiver.

Statement of Facts.

All of the facts necessary to the consideration of this case have been specially found by the auditor, concisely and in detail, and specifically set forth, together with exhibits and all other matters pertinent thereto, in a report which has been filed with this Honor-

able Court. These findings of fact are made in connected narrative form, and are plainly segregated in the report from the conclusions of law drawn therefrom by the auditor. These findings of fact by the auditor are final by stipulation, and having been adopted by the court are special findings forming part of the record. Specific reference to the entire auditor's report is hereby made, and the same in its entirety as filed is hereby specifically incorporated herein by reference and may be referred to.

RULINGS AND CONCLUSIONS OF LAW EXCEPTED TO BY THE PLAINTIFF.

A memorandum filed by the court on March 18, 1936, contained the following rulings of law:

1. "Upon these facts the bonds do not constitute valid obligations of the Standard Surety and Casualty Company and could not have been enforced by the Boston-Continental National Bank."
2. "But I feel bound by *Rankin* v. *City National Bank,* 206 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank."
3. "The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained and all other exceptions of both parties are overruled."
4. "In the law actions numbered 5225, 5316 and 5317 judgment is to be entered for the defendant."

As above noted on March 23, 1936, the order of March 18, 1936, in so far as it deals with the law actions was vacated and set aside, and on the same day the court

1. Ruled that the law actions could not be maintained.
2. Ordered judgment to be entered for the defendant in each of the three law actions.

PLAINTIFF'S EXCEPTIONS.

The plaintiff during the course of the trial, and within the time required by law and the rules of this Honorable Court, duly excepted

(a) To the rulings of law made by the court above set forth;

(b) to the orders for judgment for the defendant;

and all of said exceptions were duly saved by the court, and the plaintiff being aggrieved by these several rulings and orders for judgment, which were the subject of said exceptions, brings this bill of exceptions, and prays that it may be allowed.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
SAMUEL HOAR,
RICHARD M. NICHOLS.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

PLAINTIFF'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.

[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it will be found printed on pages 146, 147 of this volume, in case No. 5225, Law. JAMES S. ALLEN, *Clerk.*]

No. 3849, EQUITY DOCKET.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, Plaintiff,

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL., Defendants.

This cause was begun in the Superior Court for the County of Suffolk, District of Massachusetts, and was thence removed by the defendant to this United States District Court and was filed in this court on the eighteenth day of March, A. D. 1933, and is in the words and figures following:

RECORD OF STATE COURT.

[Filed in District Court March 18, 1933.]

(EXTRACTS.)

COMMONWEALTH OF MASSACHUSETTS.

[L. S.] SUFFOLK, ss.

To all Persons to whom these Presents shall come, GREETING:

Know ye, that among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case.

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity

Standard Surety & Casualty Company of New York, Plaintiff

vs.

Boston-Continental National Bank and Joseph Stone, Defendants

BILL OF COMPLAINT

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association legally established and existing under the laws of the United States of America, having its usual place of business in said Boston. The defendant Joseph Stone is a resident of Brockton in the County of Plymouth in said Commonwealth.

3. The plaintiff is informed and believes and therefore avers that on or about June 2nd, A. D. 1931 the defendant Joseph Stone and one Percy G. Cliff executed an instrument a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed marked B and made a part hereof.

4. The plaintiff is informed and believes and therefore avers that the instrument aforesaid marked A. was executed by said Cliff at the request and solicitation of the defendants without any considera-

tion or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instrument was not a binding obligation of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instrument would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time it should be returned to said Cliff.

5. The instrument above described copy of which is hereto annexed marked A was executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instrument which is now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instrument marked A, by suit or otherwise.

2. That the said instrument marked A be declared null and void and that the defendant bank be ordered to deliver it up to be cancelled.

3. For such other and further relief as may be necessary and proper.

By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

A.

No. 9485-31 $52,000.00

Know all Men by these Presents, That we, Joseph Stone of Brockton, Massachusetts, as Principal, and the Standard Surety & Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking Corporation

duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of fifty-two thousand dollars ($52,000.00), to be paid to said Boston Continental National Bank as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Joseph Stone shall, within one year from this date, make to the Boston Continental National Bank, full and true payment of an obligation in the sum of fifty-two thousand dollars ($52,000.00), then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, one year from this date, the obligee shall notify the Home Office of the said Surety Company at 80 John Street, New York City, New York, within ten days by registered mail of such default and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid obligation of fifty-two thousand dollars ($52,000.00), said payment to be made by the Surety Company within thirty days after the receipt by the Surety Company of the notice of default.

Witness our hands and seals, and dated this 2nd day of June, A. D. 1931.

JOSEPH STONE [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

by Percy G. Cliff Attorney-in-fact.

B.

RELEASE.

Whereas, on the second day of June, nineteen hundred thirty-one, Joseph Stone, of Brockton in the County of Plymouth and the Commonwealth of Massachusetts, as Principal and the Standard Surety & Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, did execute a Bond to the Boston Continental National Bank, wherein the said Joseph

Stone as Principal and the Standard Surety & Casualty Company, as Surety, did bind themselves to the said Boston Continental National Bank in the sum of fifty-two thousand dollars ($52,000.00) to be paid to said Boston Continental National Bank in the event that the said Joseph Stone should not, within one year from the date hereof, fully pay and discharge to the said Boston Continental National Bank, the sum of fifty-two thousand dollars ($52,000.00).

And whereas said Joseph Stone has fully paid and discharged his obligation, now therefore, in consideration of the premises and of one dollar ($1.00) in hand, well and truly paid by said Surety Company to said Boston Continental National Bank, receipt of which is hereby acknowledged, said Boston Continental National Bank does hereby forever discharge, release and hold harmless, the said Surety Company from any liaibility whatsoever under, or in connection with said Bond.

In witness whereof, said Boston Continental National Bank has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this fourth day of June, nineteen hundred and thirty-one.

BOSTON CONTINENTAL NATIONAL BANK
By T. M. Ragan, President.

Signed, sealed and delivered in the presence of
Witness

This bill was entered and filed in our said Court on the twenty-third day of February A. D. 1932, when and where the plaintiff appeared by Messrs. Stewart & Chase and James T. Connolly, Esq. its attorneys as aforesaid. And the following was endorsed on said bill, to wit:

"Subp. ret. April issued".

. . . . . .

And on said nineteenth day of July, 1932, the following Plea of Boston Continental National Bank was filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. In Equity No. 39424

Standard Surety and Casualty Company of New York

v.

Boston-Continental National Bank and Joseph Stone

PLEA OF BOSTON-CONTINENTAL NATIONAL BANK

Now comes Boston-Continental National Bank and expressly reserving its right to file answer herein hereby pleads to the plaintiff's Bill of Complaint as follows:

The defendant, Boston-Continental National Bank, closed in the regular course of business on December 16, 1931, and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931 by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B. Cunningham Receiver of said defendant bank on December 22, 1931 and said Receiver duly qualified by filing bond in the amount of Four hundred thousand dollars ($400,000) for the faithful performance of his duties; said John B. Cunningham is still acting as such Receiver and has complete control over the assets and affairs of said defendant bank.

And said defendant bank further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the Bill of Complaint, because

First. John B. Cunningham, Receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined nor named in the Bill of Complaint.

Second. The Court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a Receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant, Boston-Continental National Bank moves that the bill be dismissed with costs.

By its Attorneys,

GOODWIN, PROCTER & HOAR.

Thence the suit was continued unto the fifth day of December,

1932, when on said day, the following rulings on pleas of defendants was handed down, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity

No. 39422

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39423

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39424

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39425

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

RULINGS OF THE COURT ON PLEAS OF THE DEFENDANTS BOSTON-CONTINENTAL NATIONAL BANK, GORDON A. ROBINSON AND ARTHUR D. CRONIN

These suits came on to be heard together by me on the pleas of the defendants Boston-Continental National Bank, Gordon A. Robinson and Arthur D. Cronin. It was agreed that the facts set up in the pleas are true and that I should pass upon the merits of the pleas as well as upon their sufficiency in law.

The pleas first raise the point that the receiver of the Bank appointed by the Comptroller of the Currency is a necessary party. The receiver had been appointed before these suits were brought. All the assets of the Bank are in the complete control of the receiver. This necessarily includes the bonds which these suits seek to have canceled. If these papers are to be delivered up for cancellation as prayed for, they must be delivered up by the receiver and not by the Bank. The Bank is powerless in the matter. Looking at the cases

apart from the literal conception of the delivery up of papers to be canceled and treating the bills simply as attempts to have the bonds declared void by judicial fiat, the fact remains that these bonds, if valid, are assets of the receiver and not of the Bank. An injunction against the Bank would be futile unless it also bound the receiver. The suits seek to have declared void apparently valid assets in the hands of the receiver for which the receiver is accountable to the United States, whose officer he is. He is not an agent of the Bank. The receiver and the Bank are not to be treated by the law as if they were one and the same. See *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1. Unless therefore it can somehow be claimed that the receiver, though not a party to these suits and though not obliged to assume their defence, will be bound by a decree against the Bank, it is clear that the suits will prove fruitless and the trial of them will be a waste of time.

The plaintiff has claimed that the receiver will be bound by any decree against the bank; but he cites in support of this proposition cases like *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, where a proof of claim for a debt established in an action at law against the bank was held to bind the receiver to include this liability with other proved claims in making distribution. Cases so holding rest upon express provisions of the National Bank Act bringing about that result. They are quite unlike the cases at bar where the attempt is not to prove a claim as the basis of sharing a dividend, but to take from the receiver and destroy an apparent asset in his sole possession and control. This distinction is pointed out in *Barons* v. *First National Bank of Plainville*, 28 Fed. (2d) 615. If any of the cases cited by the plaintiff ignore the difference between the two classes of cases, it seems to me that they misapprehend the basis and limitations of the rule in the Bank of Bethel case. The Supreme Court of the United States itself has said (in a case where the plaintiff sought to set aside his stock subscription agreement for fraud) that as the rights of the receiver were involved, the only way in which the plaintiff could effectively raise the question was by a suit against the bank and the receiver. *Lantry* v. *Wallace*, 182 U. S. 536, 549. *Ryan* v. *Mt. Vernon National Bank*, 206 Fed. Rep. 452. If the receiver can be

bound, though not a party, it must be because of some special rule applicable to this particular situation. There seems to be no need of any such special rule, and I am not convinced that it exists. I do not find anything to the contrary in *Earle* v. *Pennsylvania,* 178 U. S. 449. That case shows how a plaintiff can preserve a lien which he acquired under state law before the comptroller took possession of the bank. It is not like these cases. Most of the cases which I have seen concede the right of the plaintiffs to sue a receiver of this kind in the state court in the first instance, subject of course to any right of removal which the receiver may have. The receiver is, then, a party whose presence is necessary to any really effective prosecution of the suit, it is possible to make him a party, and no reason appears for not having done so. He is a necessary party under ordinary principles of equity practice.

The second point taken in the pleas, as to jurisdiction, is probably unsound, but does not render the pleas bad. It is offered only as a deduction from the single set of facts pleaded, which in themselves state a defence to the suits.

It is therefore ordered that an interlocutory decree be entered in each case adjudging the pleas sufficient and allowing and sustaining the same.

STANLEY E. QUA,
Justice of the Superior Court

Subsequently on the ninth day of December, 1932, plaintiff's motion to join a party defendant and to amend Bill of Complaint was filed, as follows, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity No. 39424

Standard Surety & Casualty Company of New York Plaintiff

vs.

Boston Continental National Bank, and Joseph Stone Defendants

MOTION TO JOIN A PARTY DEFENDANT AND TO AMEND BILL OF COMPLAINT.

Now comes the plaintiff and moves to join John B. Cunningham, receiver of the defendant Boston Continental National Bank, as a party defendant, and to amend its Bill of Complaint as follows:

1. By adding, in the heading thereto, after the name "Joseph Stone", and before the word "Defendants" the following:

"John B. Cunningham, as he is Receiver of said Boston Continental National Bank."

2. By adding, after paragraph No. 2 of said Bill of Complaint the following:

"The defendant John B. Cunningham is the duly qualified receiver of this defendant Boston Continental National Bank appointed by the Comptroller of the Currency of the United States on December 22, 1931."

3. By adding to the end of paragraph No. 5 of the Bill of Complaint after the words "in the possession of the defendant bank" the words "or of the defendant John B. Cunningham as such receiver."

4. By adding in paragraph No. 2 of the prayer, after the words "the defendant bank" and before the words "be ordered to deliver them up to be cancelled," the words "and the defendant receiver."

By its Attorneys,
STEWART & CHASE,
JAMES T. CONNOLLY.

And on said twenty-fifth day of February, 1933, defendants' petition for removal of this suit to the District Court of the United States for the District of Massachusetts is filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity No. 39424

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Joseph Stone and John B. Cunningham, Receiver of Boston-Continental National Bank.

DEFENDANTS' PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Now come your petitioners, Boston-Continental National Bank, Joseph Stone and John B. Cunningham, Receiver of Boston-Continental National Bank, appearing specially without submitting to the

jurisdiction of the Court but expressly contesting said jurisdiction, and respectfully represent as follows:

1. The defendant Boston-Continental National Bank is a national banking association duly organized and existing under the laws of the United States with a place of business at Boston, in said County; said Bank closed in the regular course of business on December 16, 1931, and did not open thereafter; on December 17, 1931, the Comptroller of the Currency of the United States in accordance with law took charge of the assets of said Bank for the purpose of winding up its affairs; on December 22, 1931, said Comptroller appointed the defendant, John B. Cunningham, Receiver of said Bank and he duly qualified by executing bond for the faithful performance of his duties as such Receiver in the amount of $400,000; thereafter, to wit, on the 23rd day of February, 1932 a bill in equity was filed in the Superior Court for Suffolk County by Standard Surety & Casualty Company of New York against said Boston-Continental National Bank and Joseph Stone and while the affairs of said Bank were in the hands of said Receiver; that said Receiver was not joined as party defendant and the bill of complaint did not disclose the fact that said Bank had ceased to do business prior to the filing of the bill and that its affairs were in the hands of a Receiver for the purpose of liquidation.

2. Thereafter the defendants Boston-Continental National Bank and Joseph Stone filed in this Court petition and bond for removal of the cause to the United States District Court for the District of Massachusetts and the case was duly entered in said United States District Court. Thereafter the plaintiff filed a motion to remand the case to this Court on the ground that the Receiver of Boston-Continental National Bank was not joined as party defendant; said motion to remand was granted after hearing and the case was remanded to this Court.

3. Thereafter the defendant Boston-Continental National Bank filed by leave of Court a special plea to the bill on the ground that the Receiver of Boston-Continental National Bank was a necessary party defendant and that the Court had no jurisdiction to enter a decree as prayed for against said Bank. After hearing on said mo-

tion, this Court entered an order that an interlocutory decree be entered adjudging the plea sufficient and allowing and sustaining the same.

4. Thereafter the plaintiff filed a motion to join John B. Cunningham, as he is Receiver of Boston-Continental National Bank, as party defendant and to amend its bill of complaint. Said motion was allowed by this Court and process issued against John B. Cunningham, Receiver of Boston-Continental National Bank, returnable to this Court on the first Monday of February, 1933.

5. This cause is a suit in equity to cancel a certain indemnity bond in the principal amount of $52,000 now held by John B. Cunningham as Receiver as an asset of said Boston-Continental National Bank; it is a suit arising under the Constitution and laws of the United States and is a case for the winding up the affairs of said Boston-Continental National Bank; the District Court of the United States for the District of Massachusetts has original jurisdiction of this case under Section 24 of the Judicial Code of the United States.

6. Your petitioners desire to remove this suit before trial thereof into the District Court of the United States to be holden in the District of Massachusetts.

7. And your petitioners offer and file herewith good and sufficient bond for their entry in the District Court of the United States for the District of Massachusetts within thirty days from the date of the filing of this petition of a certified copy of the record in this suit and for the payment of all costs that may be awarded by said District Court of the United States if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

8. And your petitioners further represent that written notice of this petition and the bond for removal hereinbefore referred to has been given to the adverse party prior to the filing of the same by sending said notice to Stewart & Chase, 1 Federal Street, Boston, Massachusetts, whose names appear as attorneys for the adverse party on the subpoena served in this case.

9. And your petitioners therefore pray that said bond may be accepted and that said suit may be removed to the next District Court of the United States to be held in the District of Massachusetts pur-

suant to the statutes of the United States in such cases made and provided, and that no further proceeding may be had in this court.

BOSTON-CONTINENTAL NATIONAL BANK
By John B. Cunningham Receiver.
JOHN M. MORRISON
SAWYER, HARDY, STONE & MORRISON,
Attys. for Joseph Stone.
JOHN B. CUNNINGHAM
As he is Receiver of Boston-Continental National Bank.

Commonwealth of Massachusetts.

Suffolk, ss. Feb. 21, 1933.

Then personally appeared John B. Cunningham and made oath that the foregoing petition by him subscribed is true to the best of his knowledge, information and belief. Before me,

MURRAY F. HALL, [SEAL]
Notary Public.

And on said twenty-fifth day of February 1933, the following Bond for Removal is filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity No. 39424

Standard Surety & Casualty Company of New York
v.
Boston-Continental National Bank, Joseph Stone and John B. Cunningham, Receiver of Boston-Continental National Bank.

REMOVAL BOND.

Know all Men by these Presents

That Boston-Continental National Bank, a national banking association duly organized by law with an usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, and John B. Cunningham, as he is Receiver of said Boston-Continental National Bank, are jointly and severally held and firmly bound unto Standard Surety & Casualty Company of New York, a

corporation duly organized by law and having its principal place of business in the City and State of New York, in the penal sum of Five Hundred Dollars ($500), to the payment whereof well and truly to be made unto the said Standard Surety & Casualty Company of New York, its successors and assigns, they jointly and severally bind themselves and their respective successors and assigns.

The condition of this bond is that

Whereas Boston-Continental National Bank, Joseph Stone and John B. Cunningham, as he is Receiver of Boston-Continental National Bank, have petitioned the Superior Court within and for the County of Suffolk and Commonwealth of Massachusetts for the removal of a certain suit in equity pending in said County wherein Standard Surety & Casualty Company of New York is plaintiff, and Boston-Continental National Bank, Joseph Stone and John B. Cunningham, as he is Receiver of Boston-Continental National Bank are defendants to the District Court of the United States for the District of Massachusetts.

Now if said defendants, or any one of them, shall enter in said District Court of the United States for the District of Massachusetts within thirty days from the date of the petition filed herewith a certified copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States for the District of Massachusetts if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to be in full force and effect.

In witness whereof said Boston-Continental National Bank has caused these presents to be signed and its corporate seal to be hereunto affixed by John B. Cunningham, its Receiver thereunto duly authorized, and John B. Cunningham, as he is Receiver of Boston-Continental National Bank, has hereunto placed his hand and seal all on this 21st day of February, 1933.

BOSTON-CONTINENTAL NATIONAL BANK [SEAL]
By John B. Cunningham Receiver

JOHN B. CUNNINGHAM,
As he is Receiver of Boston-
Continental National Bank.

And the following are endorsed on said Removal Bond, to wit:

This bond may be approved. Stewart & Chase.

Feb. 25, 1933.

Bond accepted by the Court. (QUA, *J.*)

Attest: CLESSON S. CURTICE, Asst. Clerk.

And the following are endorsed on said Petition for Removal, to wit:

This petition may be allowed. Stewart & Chase.

Feb. 25, 1933.

Petition accepted by the Court. (QUA, *J.*)

Attest: CLESSON S. CURTICE, Asst. Clerk.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, WALTER PERLEY HALL, ESQUIRE, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this eleventh day of March, in the year of our Lord one thousand nine hundred and thirty-three.

FRANCIS A. CAMPBELL, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT. No. 39424.

DOCKET ENTRIES.

Standard Surety & Casualty Company of New York

vs.

Boston-Continental National Bank and Another

Counsel for Complainant	Counsel for Respondent.
Stewart & Chase	1932 April 25 Goodwin, Procter &
1 Federal Street	Hoar, 84 State St.
	1933 Feb. 25, John M. Morrison–
	Sawyer Hardy Stone & Morrison
	33 Broad St. for Joseph Stone

Bill Entered Feb. 23, 1932. Subpoena returnable April issued.

Mar. 24, Subpoena returned (1)

Apr. 25, Defendants' petition for removal to District Court of United States of Massachusetts (2) accepted.

Apr. 25, Bond of removal (3).

1932 May 2, Copies prepared for District Court of the United States for the District of Massachusetts.

July 5, Remanded to State Court (4).

July 19, Motion of Boston-Continental National Bank leave to file plea reserving answer allowed (5).

July 19, Plea of Boston Continental National Bank (6).

Dec. 5, Rulings on pleas of defendants (Qua J.) (See paper No. 6 in No. 39422).

Dec. 9, Motion to join party defendant and to amend bill (7)

Dec. 19, Motion (paper No. 7) allowed and process ordered and subpoena returnable February and issued.

1933 Jan 10, Subpoena returned (8)

Feb. 25, Defendants' petition for removal to the District Court of the United States for District of Massachusetts (9) accepted.

Feb. 25, Removal Bond (10)

Mar. 11, Copies prepared for District Court of the United States for the District of Massachusetts.

(March 11, A. D. 1933)

Copy.

Attest: FRANCIS A. CAMPBELL, *Clerk.*

[MEMORANDUM. Certain parts omitted from the State Court Record pursuant to directions contained in the praecipe of the Boston-Continental National Bank and the Receiver. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term of this court, A. D. 1933, when, to wit, April 14, 1933, the following Answer of Boston-Continental National Bank et al. was filed:

ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

[Filed April 14, 1933.]

Now come Boston-Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint say as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint, they say that the instrument, a copy whereof is attached to the bill of complaint marked "A", was duly executed by the plaintiff by Percy G. Cliff, its attorney-in-fact; that if a purported release was delivered to said Cliff by Boston-Continental National Bank by T. M. Ragan, president, in the form attached to the bill of complaint marked "B", such purported release was delivered without authority of the Board of Directors of said Boston-Continental National Bank, was executed without consideration and is voidable and void. Except as aforesaid, they deny the allegations contained in said paragraph 3 of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A", has been broken in that Joseph Stone, the principal named therein, has not paid the obligation described in said instrument according to its terms, except the sum of $237.31, but on the contrary has failed, refused and declined to pay said obligation and still continues so to refuse notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, to

payment in full of said obligation; that the plaintiff was duly notified of the default in accordance with the terms of said instrument; that the damages sustained by these defendants on account of the default of said Joseph Stone are in excess of $52,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, January 31, 1935, the following Motion of Receiver to be Substituted as Party Defendant was filed:

MOTION OF FREDERICK S. DEITRICK, RECEIVER, TO BE SUBSTITUTED AS PARTY DEFENDANT.

[Filed January 31, 1935.]

Now comes Frederick S. Deitrick and says that he was appointed by the Comptroller of the Currency, receiver of Boston-Continental National Bank on September 1, 1934, said appointment to take effect at the close of business on September 29, 1934, in place of James H. Brennan, resigned, who in turn succeeded John B. Cunningham, resigned, as receiver of said bank.

Wherefore he moves that he may be substituted as party defendant in this cause in place of said John B. Cunningham.

By his Attorneys,

MURRAY F. HALL,
GOODWIN, PROCTER & HOAR.

On the said thirty-first day of January, A. D. 1935, the foregoing motion was allowed by the court, the Honorable Elisha H. Brewster, District Judge, sitting, and Frederick S. Deitrick, receiver, was accordingly substituted as party defendant.

At the same term, to wit, February 2, 1935, a motion for a master was filed by defendants Boston-Continental National Bank and Frederick S. Deitrick, receiver.

On the fourth day of said February, the following Order Appointing Special Master was entered:

ORDER APPOINTING SPECIAL MASTER.

February 4, 1935.

No. 3849, Equity.

Standard Surety & Casualty Company of New York

v.

Boston Continental National Bank and Joseph Stone and Frederick S. Deitrick, Receiver.

No. 3850, Equity.

Standard Surety & Casualty Company of New York

v.

Boston Continental National Bank and Arthur D. Cronin and Frederick S. Deitrick, Receiver.

No. 3851, Equity.

Standard Surety & Casualty Company of New York

v.

Boston Continental National Bank and Westchester Discount Corporation and Frederick S. Deitrick, Receiver.

No. 3852, Equity.

Standard Surety & Casualty Company of New York

v.

Boston Continental National Bank and Gordon A. Robinson and Frederick S. Deitrick, Receiver.

McLELLAN, J. The above-entitled cases came on to be heard at this term upon defendant's motion for reference to a master, and upon consideration thereof, the court being satisfied that reference to a special master is necessary, and by agreement of parties, it is

Ordered, adjudged and decreed that the above-entitled cases be referred to W. Barton Leach, Esquire, of Weston, Massachusetts, as special master to hear the parties and their evidence, and to report to the court his findings of fact and his conclusions thereon in accordance with the equity rules.

It is further ordered that the special master proceed as expedi-

tiously as practicable; that he may sit anywhere within this district as he may determine, or elsewhere by consent of parties, and that said hearings shall begin on March 11, 1935, and be completed on or before April 1, 1935; that his compensation as special master in the above entitled cases and as auditor in law cases Nos. 5225, 5316 and 5317, between the same parties, shall be at the rate of seventy-five dollars per day; and that the compensation plus expenses and stenographer's fees of said master and auditor shall be paid equally from time to time by the parties and be taxed as costs against the losing party.

By the Court,

JOHN E. GILMAN, JR.,

Deputy Clerk.

February 4, 1935.

H. D. M.,

D. J.

Also at the same term, to wit, February 16, 1935, the following Notice of Frederick S. Deitrick, Receiver, to Admit Facts was filed:

NOTICE OF FREDERICK S. DEITRICK, RECEIVER TO ADMIT FACTS.

[Filed February 16, 1935.]

[MEMORANDUM. Copy of notice to admit facts is here omitted, as it already appears printed on pages 27–33 of this volume, in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

On the twenty-fifth day of said February, the following Answer to Receiver's Notice to Admit Facts was filed:

ANSWER OF STANDARD SURETY & CASUALTY COMPANY TO RECEIVER'S NOTICE TO ADMIT FACTS.

[Filed February 25, 1935.]

[MEMORANDUM. Copy of answer of Standard Surety & Casualty Company to receiver's notice to admit facts is here omitted, as it already appears printed on pages 34, 35 of this volume, in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term, A. D 1935, when, to wit, April 10, 1935, the following Motion to Amend Bill of Complaint was filed and allowed:

MOTION TO AMEND BILL OF COMPLAINT.

[Filed and allowed April 10, 1935.]

Now comes the plaintiff, Standard Surety & Casualty Company of New York, and moves to amend its bill of complaint by inserting therein after paragraph 5 the following:

"6. That the said Boston-Continental National Bank at the time of the appointment of said John B. Cunningham as receiver, was the obligee on certain 'Bankers Blanket Bonds' issued by the Fidelity & Deposit Company of Maryland, indemnifying said bank against the losses therein specified; that on or about April 28, 1932, said bank through its said receiver notified said Fidelity & Deposit Company, by letter dated April 28, 1932, that it claimed a right to recover from said Fidelity & Deposit Company of Maryland, on said 'Bankers Blanket Bonds', the face value of the instrument annexed to this bill of complaint and marked 'A', on the ground that said instrument, therein described as a bond of the Standard Surety & Casualty Company of New York, was fraudulent, invalid and uncollectible; that subsequent thereto and on or about June 2, 1932, said bank through its said receiver pursuant to the provision of said bonds and in order to recover thereon, filed with said Fidelity & Deposit Company a proof of claim under said bonds, subscribed and sworn to by its said receiver, by which said receiver sought to recover on said bonds on the theory that the instrument annexed to this bill of complaint and marked 'A' was fraudulent, invalid and uncollectible as stated by said receiver; that subsequently said receiver brought in this court an action against said Fidelity & Deposit Company of Maryland (5498 Law) in which he sought to recover on said 'Bankers Blanket Bonds' in accordance with said claims; and that the plaintiff in said action, who is the defendant in this suit, prosecuted said claims to judgment in said action, after receiving notice that the plaintiff herein was liable to said Fidelity & Deposit Company of Maryland as a re-insurer of the liability of said Fidelity & Deposit Company on said 'Bankers Blanket Bonds'.

Wherefore, as this plaintiff says, the defendant herein is barred from asserting any claim based upon a contrary and inconsistent contention that the instrument annexed to this bill of complaint and marked 'A' is valid and collectible."

By its Attorneys,

STEWART & CHASE,
RAYMOND BALDWIN.

At the same term, to wit, June 6, 1935, the following Master's and Auditor's Report was filed:

MASTER'S AND AUDITOR'S REPORT.

[Filed June 6, 1935.]

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

No. 3850 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

EXHIBITS.

[MEMORANDUM. Copies of Master's and Auditor's Report and exhibits are here omitted, as they are identical with those printed on pages 42–129 of this volume in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the June Term, A. D. 1935, when, to wit, June 26, 1935, the following Exceptions of the Standard Surety & Casualty Company to the Master's Report were filed:

EXCEPTIONS OF STANDARD SURETY & CASUALTY COMPANY TO REPORT OF MASTER AND AUDITOR.

[Filed June 26, 1935.]

[MEMORANDUM. Copy of exceptions of Standard Surety & Casualty Company to the Master's Report is here omitted, as it already appears printed on pages 130–136 of this volume in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the September Term, A. D. 1935, when, to wit, October 10, 1935, said cause was set down for hearing on the above exceptions to report of master and auditor, the Honorable Hugh D. McLellan, District Judge, sitting.

Said cause was thence continued under advisement to the present March Term, A. D. 1936, when, to wit, March 18, 1936, a memorandum in connection with exceptions to master's and auditor's report is filed, ruling that the exceptions of the Surety Company to the audi-

tor's and master's conclusion that the bonds are enforceable by the receiver be sustained and that all other exceptions of both parties be overruled and that decrees for the cancellation of the bonds and the dismissing of the counterclaims be entered.

On the eighteenth day of June, A. D. 1936, the following Interlocutory Decree on master's report and exceptions thereto is entered:

INTERLOCUTORY DECREE.

June 18, 1936.

McLELLAN, J. This cause came on to be further heard at this term upon the master's report, the exceptions thereto, and the entry of a decree, and was argued by counsel; and thereupon upon consideration thereof it is

Ordered, adjudged and decreed that the exceptions of the plaintiff to the conclusions of the master contained in his report that the bond is enforceable by the receiver be and the same hereby are sustained, and that all other exceptions of both parties to said report be and the same hereby are overruled; and it is further

Ordered, adjudged and decreed that except as aforesaid said report be and the same hereby is confirmed.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1936. H. D. M.,
D. J.

Also on the said eighteenth day of June, A. D. 1936, the following Final Decree is entered:

FINAL DECREE.

June 18, 1936.

McLELLAN, J. The above-entitled cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that said bond is void and unenforceable as against the plaintiff, and that the defendant Bank and

the defendant receiver be, and they hereby are, perpetually enjoined from enforcing or attempting to enforce the same against the plaintiff by suit or otherwise; it is further

Ordered, adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed; and it is further

Ordered, adjudged and decreed that the defendant receiver pay to the plaintiff its costs, in a sum to be taxed by the clerk, and that execution issue therefor.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1936. H. D. M.,
D. J.

MEMORANDUM.
March 18, 1936.

[MEMORANDUM. Copy of memorandum is here omitted, as it already appears printed on pages 139–141 of this volume, in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

DEFENDANT'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.
[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it is identical with the one already printed on pages 146, 147 of this volume, in case No. 5225 Law, except that the "defendants" file the motion in this case and not the "plaintiff". JAMES S. ALLEN, *Clerk.*]

MOTION FOR SEVERANCE OF JOSEPH STONE.
[Filed and allowed September 25, 1936.]

Now come Boston-Continental National Bank and Frederick S. Deitrick, receiver of Boston-Continental National Bank, aggrieved parties in the foregoing proceedings, who have claimed appeals to

the United States Circuit Court of Appeals, and move a severance from Joseph Stone, a possible party in interest in these proceedings who has not claimed an appeal.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS.

September 25, 1936. Allowed.

HUGH D. MCLELLAN,
D. J.

From the final decrees entered in the four equity cases, numbered respectively 3849 3850, 3851 and 3852, the Boston-Continental National Bank claims an appeal to the United States Circuit Court of Appeals for the First Circuit on the fifteenth day of September, 1936, and said appeal is allowed by the court on the same day.

BANK'S ASSIGNMENT OF ERRORS.

[Filed September 15, 1936.]

Equity No. 3849.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

Equity No. 3850.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

Equity No. 3851.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

Equity No. 3852

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

Now comes the Boston-Continental National Bank and, in connection with its petition for appeal in the above-entitled actions (consolidated for the purpose of appeal) makes the following assignment of errors, which it states occurred upon the trial of the cases in the United States District Court for the District of Massachusetts, to wit:

1. The court, upon the facts found, erred in entering final decrees declaring the several bonds and endorsements referred to in said decrees to be void and unenforceable, and enjoining said Boston-Continental National Bank and the receiver thereof from enforcing the same.

2. The court, upon the facts found, erred in entering final decrees dismissing the counterclaim in each case.

3. The court, upon the facts found, erred in ruling as follows:

(a) "Upon these facts the bonds do not constitute valid obligations of the Standard Surety & Casualty Company and could not have been enforced by the Boston-Continental National Bank."

(b) "I feel bound by *Rankin* v. *City National Bank*, 206 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank."

(c) "The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained . . . ."

4. In equity case numbered 3851, the court, upon the facts found, erred in overruling the exception of said bank and receiver to rulings of the master and auditor that the Westchester bond dated December 20, 1930 and "endorsements" do not secure payment of the note of forty thousand dollars ($40,000) of Westchester Discount Corporation dated December 23, 1930, and that there can be no recovery upon this bond and "endorsements".

5. The court, upon the facts found, erred in ruling that if the Boston-Continental National Bank could not recover on the bonds and endorsements in suit the receiver of the Boston-Continental National Bank could not recover.

Wherefore the Boston-Continental National Bank prays that the judgment of the District Court may be reversed.

By its Attorneys,

GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS.

PRAECIPE.

[Filed November 10, 1936.]

Equity No. 3849.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

Equity No. 3850.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

Equity No. 3851.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

Equity No. 3852.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

To the Clerk of the Above Named Court:

Please prepare a transcript of the record, pleadings, proceedings and papers in the above-entitled cases, consolidated for appeal with

law cases numbered 5225, 5316 and 5317, to be transmitted to the United States Circuit Court of Appeals for the First Circuit in the matter of the appeals of Boston-Continental National Bank and Frederick S. Deitrick, receiver, heretofore allowed herein, and include in such transcript copies of the following papers and proceedings, to wit:

In Case No. 3849 Equity.

1. The following papers originally filed in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts:

(a) Bill of complaint against Boston-Continental National Bank, defendant.

(b) Plea of defendant Boston-Continental National Bank that John B. Cunningham, receiver of the defendant bank is a necessary party defendant and rulings of the court on pleas.

(c) Plaintiff's motion to join John B. Cunningham, receiver of the defendant bank, as a party defendant and to amend its bill of complaint, together with order of the court thereon.

(d) Defendant's petition to remove the cause to the United States District Court for the District of Massachusetts.

(e) Removal bond filed February 25, 1933.

(f) All docket entries in the said Superior Court.

2. Answer of Boston-Continental National Bank and John B. Cunningham, receiver.

3. Motion of Frederick S. Deitrick, receiver, to be substituted as party defendant, together with order of the court thereon.

4. Recital of filing of motion of defendant bank and receiver for a master.

5. Order appointing special master.

6. Receiver's notice to admit facts.

7. Plaintiff's answer to receiver's notice to admit facts.

8. Plaintiff's motion to amend bill of complaint, together with order of the court thereon.

9. Master's report and exhibits.

10. Plaintiff's exceptions to master's report.

11. Memorandum of the court.

12. Interlocutory decree.

13. Final decree.

14. Motion to consolidate cases for appeal, together with order of the court thereon.

15. Motion to sever Joseph Stone, together with order of the court thereon.

16. Praecipe of Boston-Continental National Bank and Frederick S. Deitrick, receiver.

17. Necessary appeal papers.

In Case No. 3850 Equity.

1. The following papers originally filed in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts:

(a) Bill of complaint against Boston-Continental National Bank, defendant.

(b) Plea of defendant Boston-Continental National Bank that John B. Cunningham, receiver of the defendant bank is a necessary party defendant.

(c) Plaintiff's motion to join John B. Cunningham, receiver of the defendant bank, as a party defendant and to amend its bill of complaint, together with order of the court thereon.

(d) Defendant's petition to remove the cause to the United States District Court for the District of Massachusetts.

(e) Removal bond filed February 25, 1933.

(f) All docket entries in the said Superior Court.

2. Answer of Boston-Continental National Bank and John B. Cunningham, receiver.

3. Motion of Frederick S. Deitrick, receiver to be substituted as party defendant, together with order of the court thereon.

4. Motion of defendant bank and receiver for a master.

5. Order appointing special master.

6. Receiver's notice to admit facts.

7. Plaintiff's answer to receiver's notice to admit facts.

8. Plaintiff's motion to amend bill of complaint, together with order of the court thereon.

9. Master's report and exhibits.

10. Plaintiff's exceptions to master's report.

11. Memorandum of the court.

12. Interlocutory decree.

13. Final decree.

14. Motion to consolidate cases for appeal, together with order of the court thereon.

15. Motion to sever Arthur D. Cronin, together with order of the court thereon.

16. Praecipe of Boston-Continental National Bank and Frederick S. Deitrick, receiver.

17. Necessary appeal papers.

In Case No. 3851 Equity.

1. The following papers originally filed in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts:

(a) Bill of complaint against Boston-Continental National Bank, defendant.

(b) Plea of defendant Boston-Continental National Bank that John B. Cunningham, receiver of the defendant bank, is a necessary party defendant.

(c) Plaintiff's motion to join John B. Cunningham, receiver of the defendant bank, as a party defendant and to amend its bill of complaint, together with order of the court thereon.

(d) Defendant's petition to remove the cause to the United States District Court for the District of Massachusetts

(e) Removal bond filed February 25, 1933.

(f) All docket entries in the said Superior Court.

2. Answer of Boston-Continental National Bank and John B. Cunningham, receiver.

3. Motion of Frederick S. Deitrick, receiver to be substituted as party defendant, together with order of the court thereon.

4. Motion of defendant bank and receiver for a master.

5. Order appointing special master.

6. Receiver's notice to admit facts.

7. Plaintiff's answer to receiver's notice to admit facts.

8. Plaintiff's motion to amend bill of complaint, together with order of the court thereon.

9. Master's report and exhibits.

10. Exceptions of Boston-Continental National Bank and Frederick S. Deitrick, receiver, to master's report.

11. Plaintiff's exceptions to master's report.

12. Memorandum of the court.

13. Interlocutory decree.

14. Final decree.

15. Motion to consolidate cases for appeal, together with order of the court thereon.

16. Motion to sever Westchester Discount Corporation, together with order of the court thereon.

17. Praecipe of Boston-Continental National Bank and Frederick S. Deitrick, receiver.

18. Necessary appeal papers.

In Case No. 3852 Equity.

1. The following papers originally filed in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts:

(a) Bill of complaint against Boston-Continental National Bank, defendant.

(b) Plea of defendant Boston-Continental National Bank that John B. Cunningham, receiver of the defendant bank is a necessary party defendant.

(c) Plaintiff's motion to join John B. Cunningham, receiver of the defendant bank, as a party defendant and to amend its bill of complaint, together with order of the court thereon.

(d) Defendant's petition to remove the cause to the United States District Court for the District of Massachusetts.

(e) Removal bond filed February 25, 1933.

(f) All docket entries in the said Superior Court.

2. Answer of Boston-Continental National Bank and John B. Cunningham, receiver.

3. Motion of Frederick S. Deitrick, receiver, to be substituted as party defendant, together with order of the court thereon.

4. Motion of defendant bank and receiver for a master.
5. Order appointing special master.
6. Receiver's notice to admit facts.
7. Plaintiff's answer to receiver's notice to admit facts.
8. Plaintiff's motion to amend bill of complaint, together with order of the court thereon.
9. Master's report and exhibits.
10. Plaintiff's exceptions to master's report.
11. Memorandum of the court.
12. Interlocutory decree.
13. Final decree.
14. Motion to consolidate cases for appeal, together with order of the court thereon.
15. Motion to sever Gordon A. Robinson, together with order of the court thereon.
16. Praecipe of Boston-Continental National Bank and Frederick S. Deitrick, receiver.
17. Necessary appeal papers.

ROBERT E. GOODWIN,
RICHARD M. NICHOLS,
GOODWIN, PROCTER & HOAR.
Attorneys for Boston-Continental National Bank and Frederick S. Deitrick, Receiver of said Bank.

Service acknowledged this sixth day of November, 1936.

STEWART & CHASE,
Attorneys for Standard Surety & Casualty Company of New York.

A citation on appeal was issued on the fifteenth day of September, A. D. 1936, on behalf of the Boston-Continental National Bank in the four equity cases, numbered 3849, 3850, 3851 and 3852, said citation being made returnable in the United States Circuit Court of Appeals on October 13, 1936. Service of said citation was duly acknowledged.

No. 3850, EQUITY DOCKET.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, Plaintiff,

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL., Defendants.

This cause was begun in the Superior Court for the County of Suffolk, District of Massachusetts, and was thence removed by the defendant to this United States District Court and was filed in this court on the eighteenth day of March, A. D. 1933, and is in the words and figures following:

RECORD OF STATE COURT.

[Filed in District Court March 18, 1933.]

(EXTRACTS.)

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To all Persons to whom these Presents shall come, GREETING:

Know ye, That among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case.

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity.

Standard Surety & Casualty Company of New York, Plaintiff

vs.

Boston-Continental National Bank and Arthur D. Cronin, Defendants.

BILL OF COMPLAINT.

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association legally established and existing under the laws of the United States of America, having its usual place of business in said

Boston. The defendant Arthur D. Cronin is a resident of said Boston.

3. The plaintiff is informed and believes and therefore avers that on or about September 6th, A. D. 1930, the defendant Arthur D. Cronin and one Percy G. Cliff executed an instrument, a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed marked B and made a part hereof. Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed the instruments entitled "endorsements", copies of which marked respectively C., D. and E. are hereto annexed and made parts hereof.

4. The plaintiff is informed and believes and therefore avers that all of the instruments aforesaid marked A. C. D. and E. were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said Cliff.

5. All of the instruments above described copies of which are hereto annexed marked A. C. D. and E. were executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instruments marked A. C. D. and E. or any of them by suit or otherwise.

2. That the said instruments marked A. C. D. and E. be declared

null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

A.

Standard Surety & Casualty Company of New York.
Home Office 80 Johns Street New York, N. Y.

No. $20,000.00

Know all Men by these Presents, That we, Arthur D. Cronin of Boston, in the County of Suffolk and the Commonwealth of Massachusetts, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston in the County of Suffolk, in the full and just sum of twenty thousand dollars ($20,000.), to be paid to said Continental National Bank of Boston, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if Arthur D. Cronin shall, within six months from date hereof, make to the Continental National Bank of Boston, full and true payment of note in the amount of twenty thousand dollars ($20,000.), maturing September twenty-second, nineteen hundred and thirty, or of any extension thereof, in whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, the obligee shall notify the Home office of such Surety at 80 John Street, New York City, New York, within ten days (10), by registered mail, of such default, and the Surety Company shall within thirty days (30) pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of de-

fault six months from date hereof and in no event exceeding twenty thousand dollars, ($20,000).

Witness our hands and seals, and dated this 6th day of September, A. D. 1930.

ARTHUR D. CRONIN [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

By Percy G. Cliff Attorney in fact.

B.

RELEASE.

Whereas, on the sixth day of September nineteen hundred thirty, Arthur D. Cronin of Boston, in the County of Suffolk and the Commonwealth of Massachusetts, as Principal and the Standard Surety and Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having a usual place of business in Boston, as Surety, did execute a Bond to the Continental National Bank of Boston, wherein the said Arthur D. Cronin, as Principal and the Standard Surety & Casualty Company, as Surety, did bind themselves to the said Continental National Bank of Boston in the sum of twenty thousand dollars ($20,000), to be paid to said Continental National Bank of Boston in the event that the said Arthur D. Cronin should not, within six months from the date hereof, fully pay and discharge to the said Continental National Bank, the sum of twenty thousand dollars ($20,000.) advanced to said Arthur D. Cronin on a certain promissory note of twenty thousand dollars ($20,000.) made by said Arthur D. Cronin to said Continental National Bank of Boston, bearing date, August twenty-second, nineteen hundred thirty and maturing due the twenty-second day of September, nineteen hundred thirty.

And whereas said Arthur D. Cronin has fully paid and discharged his obligation under said note, now therefore, in consideration of the premises and of one dollar ($1.00) in hand, well and truly paid by said Surety Company to said Continental National Bank of Boston, receipt of which is hereby acknowledged, said Continental National Bank of Boston does hereby forever discharge, release and hold harm-

less, the said Surety Company from any liability whatsoever under, or in connection with said Bond.

In witness whereof, said Continental National Bank of Boston has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this ninth day of September, nineteen hundred and thirty.

CONTINENTAL NATIONAL BANK OF BOSTON [SEAL]
By T. M. Ragan, President.

Signed, sealed and delivered in the presence of
Arthur D. Cronin, witness.

C.

Standard Surety & Casualty Company of New York.
Home Office: 80 John Street, New York.
Boston Branch Office, 33 Broad Street, Percy G. Cliff, Manager.
Telephone Hancock 8811 Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $20,000. in connection with a note of Arthur D. Cronin of Boston, given to the said Continental National Bank of Boston and maturing on March 22nd, 1931, is hereby extended for a period of two months from this date in an amount not to exceed $15,000., or such portion thereof as may remain unpaid on date of May 22nd, 1931.

In event of default on the part of the principal, said Arthur D. Cronin of Boston, the obligee, the said Continental National Bank of Boston, shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail, of such default.

Witness our hand this twenty-first day of March, A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK.
By Percy G. Cliff Attorney-in-fact.

D.

Standard Surety & Casualty Company of New York.

v.

Home Office: 80 John Street, New York.

Boston Branch Office, 33 Broad Street, Percy G. Cliff, Manager

Telephone Hancock 8811 Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $20,000. in connection with a note of Arthur D. Cronin of Boston, given to the said Continental National Bank of Boston and maturing on March 22nd, 1931 and subsequently extended for a period of two months to May 22nd, 1931, is hereby further extended in an amount not to exceed $15,000., or such portion thereof as may remain unpaid on date of November third, nineteen hundred thirty-one.

In event of default on the part of the principal, said Arthur D. Cronin, of Boston, the obligee, the said Continental National Bank of Boston, shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail, of such default.

Witness our hand this twenty-first day of May A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

By Percy G. Cliff, Attorney-in-Fact.

E.

ENDORSEMENT.

For Value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $20,000. in connection with a note of Arthur D. Cronin of Boston, given to the said Continental National Bank of Boston and maturing on March 22nd, 1931 and subsequently extended to November 3rd, 1931, is hereby further extended in an

amount not to exceed $14,000.00 or such portion thereof, as may remain unpaid on date of November 3rd, 1932.

In event of default on the part of the principal, said Arthur D. Cronin of Boston, the obligee the said Continental National Bank of Boston shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail of such default.

Witness our hand, this second day of November, nineteen hundred thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff, Attorney-in-Fact.

This bill was entered and filed in our said court on the twenty-third day of February, A. D. 1932, when and where the plaintiff appeared by Messrs. Stewart & Chase and James T. Connolly, Esq. its attorneys as aforesaid.

. . . . . .

And on said nineteenth day of July 1932, the following Plea of Boston-Continental National Bank was filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. In Equity No. 39425.

Standard Surety and Casualty Company of New York

v.

Boston-Continental National Bank and Arthur D. Cronin.

PLEA OF BOSTON-CONTINENTAL NATIONAL BANK.

Now comes Boston-Continental National Bank and expressly reserving its right to file answer herein hereby pleads to the plaintiff's Bill of Compaint as follows:

The defendant, Boston-Continental National Bank, closed in the regular course of business on December 16, 1931, and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931, by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B. Cunningham receiver of said defendant bank on December 22, 1931, and said receiver duly qualified by filing bond in the amount of four hundred thousand dollars ($400,000) for the faithful performance of

his duties; said John B. Cunningham is still acting as such receiver and has complete control over the assets and affairs of said defendant bank.

And said defendant bank further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the Bill of Complaint, because

First. John B. Cunningham, receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined nor named in the bill of complaint.

Second. The court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant Boston-Continental National Bank moves that the bill be dismissed with costs.

By its Attorneys,

GOODWIN, PROCTER & HOAR.

Also on said nineteenth day of July 1932, the plea of said Arthur D. Cronin was filed, as follows, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. In Equity. No. 39425.

Standard Surety and Casualty Company of New York

and

Boston-Continental National Bank and Arthur D. Cronin.

PLEA OF ARTHUR D. CRONIN.

Now comes Arthur D. Cronin and expressly reserving his right to file answer herein hereby pleads to the plaintiff's Bill of Complaint as follows:

The defendant, Boston-Continental National Bank, closed in the regular course of business on December 16, 1931, and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931 by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B. Cunningham receiver of said defendant bank on December 22, 1931 and said receiver duly qualified by filing bond in the amount of four hun-

dred thousand dollars ($400,000) for the faithful performance of his duties; said John B. Cunningham is still acting as such receiver and has complete control over the assets and affairs of said defendant bank.

The defendant Arthur D. Cronin further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the Bill of Complaint because

First: John B. Cunningham, receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined or named in the Bill of Complaint.

Second: The Court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant Arthur D. Cronin moves that the bill be dismissed with costs. By his Attorney,

DANIEL A. SHEA.

And the Court endorsed the following on said Plea, to wit:

July 19, 1932. May be filed. Whiting, J.

Thence the case was continued unto the fifth day of December 1932, when on said day the following rulings on pleas of defendants was handed down, to wit:

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss. Superior Court. In Equity.

No. 39422.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39423.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39424.

Standard Surety & Casualty Company of New York.

v.

Boston-Continental National Bank, et al.

No. 39425.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

RULINGS OF THE COURT ON PLEAS OF THE DEFENDANTS BOSTON-CONTINENTAL NATIONAL BANK, GORDON A. ROBINSON AND ARTHUR D. CRONIN.

These suits came on to be heard together by me on the pleas of the defendants Boston-Continental National Bank, Gordon A. Robinson and Arthur D. Cronin. It was agreed that the facts set up in the pleas are true and that I should pass upon the merits of the pleas as well as upon their sufficiency in law.

The pleas first raise the point that the receiver of the Bank appointed by the Comptroller of the Currency is a necessary party. The receiver had been appointed before these suits were brought. All the assets of the Bank are in the complete control of the receiver. This necessarily includes the bonds which these suits seek to have canceled. If these papers are to be delivered up for cancellation as prayed for, they must be delivered up by the receiver and not by the Bank. The Bank is powerless in the matter. Looking at the cases apart from the literal conception of the delivery up of papers to be canceled and treating the bills simply as attempts to have the bonds declared void by judicial fiat, the fact remains that these bonds, if valid, are assets of the receiver and not of the Bank. An injunction against the Bank would be futile unless it also bound the receiver. The suits seek to have declared void apparently valid assets in the hands of the receiver for which the receiver is accountable to the United States, whose officer he is. He is not an agent of the Bank. The receiver and the Bank are not to be treated by the law as if they were one and the same. See *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1. Unless therefore it can somehow be claimed that the receiver, though not a party to these suits and though not obliged to assume their defence, will be bound by a decree against the Bank, it is clear that the suits will prove fruitless and the trial of them will be a waste of time. The plaintiff has claimed that the

receiver will be bound by any decree against the Bank; but he cites in support of this proposition cases like *Bank of Bethel* v. *Pahquioque Bank,* 14 Wall. 383, where a proof of claim for a debt established in an action at law against the bank was held to bind the receiver to include this liability with other proved claims in making distribution. Cases so holding rest upon express provisions of the National Bank Act bringing about that result. They are quite unlike the cases at bar where the attempt is not to prove a claim as the basis of sharing a dividend, but to take from the receiver and destroy an apparent asset in his sole possession and control. This distinction is pointed out in *Barons* v. *First National Bank of Plainville,* 28 Fed. (2d) 615. If any of the cases cited by the plaintiff ignore the difference between the two classes of cases, it seems to me that they misapprehend the basis and limitations of the rule in the Bank of Bethel case. The Supreme Court of the United States itself has said (in a case where the plaintiff sought to set aside his stock subscription agreement for fraud) that as the rights of the receiver were involved, the only way in which the plaintiff could effectively raise the question was by a suit against the bank and the receiver. *Lantry* v. *Wallace,* 182 U. S. 536, 549. *Ryan* v. *Mt. Vernon National Bank,* 206 Fed. Rep. 452. If the receiver can be bound, though not a party, it must be because of some special rule applicable to this particular situation. There seems to be no need of any such special rule; and I am not convinced that it exists. I do not find anything to the contrary in *Earle* v. *Pennsylvania,* 178 U. S. 449. That case shows how a plaintiff can preserve a lien which he acquired under state law before the comptroller took possession of the bank. It is not like these cases. Most of the cases which I have seen concede the right of the plaintiffs to sue a receiver of this kind in the state court in the first instance, subject of course to any right of removal which the receiver may have. The receiver is, then, a party whose presence is necessary to any really effective prosecution of the suit, it is possible to make him a party, and no reason appears for not having done so. He is a necessary party under ordinary principles of equity practice.

The second point taken in the pleas, as to jurisdiction, is probably

unsound, but does not render the pleas bad. It is offered only as a deduction from the single set of facts pleaded, which in themselves state a defence to the suits.

It is therefore ordered that an interlocutory decree be entered in each case adjudging the pleas sufficient and allowing and sustaining the same.

STANLEY E. QUA,
Justice of the Superior Court.

Thereafter, on the ninth day of December 1932, the following motion to join a party defendant and to amend bill of complaint was filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. In Equity No. 39425.

Standard Surety & Casualty Company of New York, Plaintiff,

vs.

Boston Continental National Bank and Arthur D. Cronin, Defendants

MOTION TO JOIN A PARTY DEFENDANT AND TO AMEND BILL OF COMPLAINT.

Now comes the plaintiff and moves to join John B. Cunningham, receiver of the defendant Boston Continental National Bank, as a party defendant, and to amend its bill of complaint as follows:

1. By adding, in the heading thereto, after the name, "Arthur D. Cronin", and before the word "Defendants" the following:

"John B. Cunningham, as he is Receiver of said Boston Continental National Bank."

2. By adding, after paragraph No. 2 of said bill of complaint the following:

"The defendant John B. Cunningham is the duly qualified receiver of this defendant Boston Continental National Bank appointed by the Comptroller of the Currency of the United States on December 22, 1931."

3. By adding to the end of paragraph No. 5 of the bill of com-

plaint after the words "in the possession of the defendant bank" the words "or of the defendant John B. Cunningham as such receiver".

4. By adding in paragraph No. 2 of the prayer, after the words "the defendant bank" and before the words "be ordered to deliver them up to be cancelled", the words "and the defendant receiver".

By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

. . . . . .

And the following was endorsed on said motion to wit:

Suffolk, ss. Dec. 19, 1932.

(F. T. Hammond, Jr.)

Allowed by court & process to issue.

Attest: LEO A. REED Asst. Clerk.

. . . . . .

Thereafter, on the twenty-fifth day of February 1933, the defendants' Petition for Removal of this action to the District Court of the United States for the District of Massachusetts is filed, as follows, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity No. 39425.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Arthur D. Cronin and John D. Cunningham, Receiver of Boston-Continental National Bank.

DEFENDANTS' PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Now come your petitioners, Boston-Continental National Bank, Arthur D. Cronin and John B. Cunningham, Receiver of Boston-Continental National Bank, appearing specially without submitting to the jurisdiction of the court but expressly contesting said jurisdiction, and respectfully represent as follows:

1. The defendant Boston-Continental National Bank is a national banking association duly organized and existing under the laws of the United States with a place of business at Boston in said County;

said bank closed in the regular course of business on December 16, 1931 and did not open thereafter; on December 17, 1931, the Comptroller of the Currency of the United States in accordance with law took charge of the assets of said bank for the purpose of winding up its affairs; on December 22, 1931, said Comptroller appointed the defendant, John B. Cunningham, receiver of said bank and he duly qualified by executing bond for the faithful performance of his duties as such receiver in the amount of $400,000; thereafter, to wit, on the 23rd day of February, 1932 a bill in equity was filed in the Superior Court for Suffolk County by Standard Surety & Casualty Company of New York against said Boston-Continental National Bank and Arthur D. Cronin and while the affairs of said bank were in the hands of said receiver; that said receiver was not joined as party defendant and the bill of complaint did not disclose the fact that said bank had ceased to do business prior to the filing of the bill and that its affairs were in the hands of a receiver for the purpose of liquidation.

2. Thereafter the defendants Boston-Continental National Bank and Arthur D. Cronin filed in this Court petition and bond for removal of the cause to the United States District Court for the District of Massachusetts and the case was duly entered in said United States District Court. Thereafter the plaintiff filed a motion to remand the case to this court on the ground that the receiver of Boston-Continental National Bank was not joined as party defendant; said motion to remand was granted after hearing and the case was remanded to this court.

3. Thereafter the defendants filed by leave of court a special plea to the bill on the ground that the receiver of Boston-Continental National Bank was a necessary party defendant and that the court had no jurisdiction to enter a decree as prayed for against said bank. After hearing on said motion, this court entered an order that an interlocutory decree be entered adjudging the plea sufficient and allowing and sustaining the same.

4. Thereafter the plaintiff filed a motion to join John B. Cunningham, as he is receiver of Boston-Continental National Bank, as party defendant and to amend its bill of complaint. Said motion was

allowed by this court and process issued against John B. Cunningham, receiver of Boston-Continental National Bank, returnable to this court on the first Monday of February, 1933.

5. This cause is a suit in equity to cancel a certain indemnity bond in the principal amount of $20,000 now held by John B. Cunningham as receiver as an asset of said Boston-Continental National Bank; it is a suit arising under the Constitution and laws of the United States and is a case for the winding up the affairs of said Boston-Continental National Bank; the District Court of the United States for the District of Massachusetts has original jurisdiction of this case under Section 24 of the Judicial Code of the United States.

6. Your petitioners desire to remove this suit before trial thereof into the District Court of the United States to be holden in the District of Masachusetts.

7. And your petitioners offer and file herewith good and sufficient bond for their entry in the District Court of the United States for the District of Massachusetts within thirty days from the date of the filing of this petition of a certified copy of the record in this suit and for the payment of all costs that may be awarded by said District Court of the United States if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

8. And your petitioners further represent that written notice of this petition and the bond for removal hereinbefore referred to has been given to the adverse party prior to the filing of the same by sending said notice to Stewart & Chase, 1 Federal Street, Boston, Massachusetts, whose names appear as attorneys for the adverse party on the subpoena served in this case.

9. And your petitioners therefore pray that said bond may be accepted and that said suit may be removed to the next District Court of the United States to be held in the District of Massachusetts pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had in this court.

BOSTON-CONTINENTAL NATIONAL BANK
By John B. Cunningham Receiver
ARTHUR D. CRONIN
By D. A. Shea Atty.

JOHN B. CUNNINGHAM
As he is Receiver of Boston-
Continental National Bank

Commonwealth of Massachusetts.

Suffolk, ss. February 21, 1933.

Then personally appeared John B. Cunningham and made oath that the foregoing petition by him subscribed is true to the best of his knowledge, information and belief. Before me,

Murray F. Hall
[SEAL]. Notary Public.

And on the twenty-fifth day of February 1933, the following Bond is filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. In Equity No. 39425.

Standard Surety & Casualty Company of New York
v.
Boston-Continental National Bank, Arthur D. Cronin and John B. Cunningham, Receiver of Boston-Continental National Bank.

REMOVAL BOND.

Know all Men by these Presents.

That Boston-Continental National Bank, a national banking association duly organized by law with an usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, and John B. Cunningham, as he is Receiver of said Boston-Continental National Bank, are jointly and severally held and firmly bound unto Standard Surety & Casualty Company of New York, a corporation duly organized by law and having its principal place of business in the City and State of New York, in the penal sum of Five Hundred Dollars ($500), to the payment whereof well and truly to be made unto the said Standard Surety & Casualty Company of New York, its successors and assigns, they jointly and severally bind themselves and their respective successors and assigns.

The condition of this bond is that

Whereas Boston-Continental National Bank, Arthur D. Cronin and John B. Cunningham, as he is receiver of Boston-Continental

National Bank, have petitioned the Superior Court within and for the County of Suffolk and Commonwealth of Massachusetts for the removal of a certain suit in equity pending in said County wherein Standard Surety & Casualty Company of New York is plaintiff and Boston-Continental National Bank, Arthur D. Cronin and John B. Cunningham, as he is receiver of Boston-Continental National Bank, are defendants to the District Court of the United States for the District of Massachusetts.

Now if said defendants, or any one of them, shall enter in said District Court of the United States for the District of Massachusetts within thirty days from the date of the petition filed herewith a certified copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States for the District of Massachusetts if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to be in full force and effect.

In witness whereof said Boston-Continental National Bank has caused these presents to be signed and its corporate seal to be hereunto affixed by John B. Cunningham, its receiver thereunto duly authorized, and John B. Cunningham, as he is receiver of Boston-Continental National Bank, has hereunto placed his hand and seal all on this 21st day of February, 1933.

BOSTON-CONTINENTAL NATIONAL BANK
By John B. Cunningham Receiver. [SEAL]
JOHN B. CUNNINGHAM
As he is Receiver of Boston-
Continental National Bank.

And the following are endorsed on said Removal Bond, to wit:

This bond may be approved. Stewart & Chase.

Feb. 25, 1933.

Bond accepted by the court. (QUA, *J.*)

Attest: CLESSON S. CURTICE Asst. Clerk.

And the following are endorsed on said Petition for Removal, to wit:

Feb. 25, 1933.

Petition accepted by the court. (QUA, *J.*)

Attest: CLESSON S. CURTICE Asst. Clerk.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, WALTER PERLEY HALL, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this eleventh day of March, in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL] FRANCIS A. CAMPBELL, *Clerk.*

DOCKET ENTRIES.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss. Superior Court. No. 39425 Eq.

Standard Surety & Casualty Company of New York

vs.

Boston-Continental National Bank and Another

Counsel for Complainant	Counsel for Respondent
Stewart & Chase	1932, April 25
1 Federal Street	Goodwin, Procter & Hoar
	84 State St.

Bill entered Feb. 23, 1932

Subpoena returnable April issued.

Mar. 15, Subpoena returned (1)

April 25, Defendants' petition for removal to District Court of the United States for Massachusetts (2) accepted

April 25, Removal Bond (3)

1932, May 2, Copies prepared for District Court of the United States for the District of Massachusetts

July 5, Remanded to State Court (4)

July 19, Motion of Boston-Continental National Bank leave to file its plea reserving answer (5) allowed.

July 19, Plea of Boston Continental National Bank (6)

July 19, Plea of Cronin (7)

Dec. 5, Rulings on pleas of defendants (Qua J.)

(See paper No. 6 in 39422 Eq.)

Dec. 9, Motion to join party defendant and to amend bill (8)

Dec. 19, Motion (paper No. 8) allowed and process ordered and subpoena returnable January & issued.

1933, Jan. 10, Subpoena returned (9)

Feb. 25, Defendants' petition for removal to United States District Court for District of Massachusetts (10) approved.

Feb. 25, Removal Bond (11)

Mar. 11, Copies prepared for District Court of the United States for the District of Massachusetts.

(March 11, A. D. 1933)

Copy.

Attest: FRANCIS A. CAMPBELL, *Clerk.*

[MEMORANDUM. Certain parts omitted from the State Court Record pursuant to directions contained in the praecipe of the Boston-Continental National Bank and the Receiver. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term of this court, A. D. 1933, when, to wit, April 14, 1933, the following Answer of Boston-Continental National Bank et al. was filed:

ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

[Filed April 14, 1933.]

Now come Boston-Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint say as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint they say that the instrument, a copy whereof is attached to the bill of complaint marked "A", was duly executed by Arthur D. Cronin, and was duly executed by the plaintiff by Percy G. Cliff, its attorney-in-fact, and that an attested copy of said Cliff's general power of attorney was attached to the original instrument; that thereafter the plaintiff duly executed the instruments entitled "Endorsements" by said Cliff, its attorney-in-fact, copies of which endorsements are attached to the bill of complaint marked "C", "D" and "E"; that if a purported release was delivered to said Cliff by Continental National Bank, by T. M. Ragan, president, in the form attached to the bill of complaint marked "B", such purported release was delivered without authority of the board of directors of said Continental National Bank, was executed without consideration and is voidable and void. Except as aforesaid, they deny the allegations contained in said paragraph 3 of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A" as extended by instruments, copies of which are attached to the bill of complaint marked "C", "D" and "E", has been broken in that Arthur D. Cronin, the principal named in said instrument, has not paid the note described therein according to its terms but on the contrary has failed, refused and declined to pay said note and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, the successors to the obligee described therein, to payment in full of said note; that the plaintiff was duly notified of the default in accordance with the provisions of said instrument; that the damages sustained by these defendants on account of the default of said Arthur D. Cronin are in excess of $20,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, January 31, 1935, the following Motion of Receiver to be Substituted as Party Defendant was filed and allowed by the court:

MOTION OF FREDERICK S. DEITRICK, RECEIVER, TO BE SUBSTITUTED AS PARTY DEFENDANT.

[Filed and allowed January 31, 1935.]

[MEMORANDUM. Copy of motion to be substituted as party defendant is here omitted as it is identical with the motion already printed in this volume, on page 195 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk*.]

At the same term, to wit, February 2, 1935, a motion for a master was filed by defendants, the Boston-Continental National Bank and Frederick S. Deitrick, receiver.

On the fourth day of said February, the following Order Appointing Special Master was entered:

ORDER APPOINTING SPECIAL MASTER.

February 4, 1935.

[MEMORANDUM. Copy of order appointing special master is here omitted, as it already appears printed on page 196 of this volume in case No. 3849, Equity. JAMES S. ALLEN, *Clerk*.]

[MEMORANDUM. Inasmuch as the notice of receiver to admit facts and answer of Standard Surety & Casualty Company to receiver's notice to admit faces are the same as those already printed on pages 27–35 of this volume in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk*.]

This cause was thence continued to the March Term, A. D. 1935, when, to wit, April 10, 1935, the following Motion to Amend Bill of Complaint was filed and allowed:

MOTION TO AMEND BILL OF COMPLAINT.

[Filed and allowed April 10, 1935.]

[MEMORANDUM. Copy of motion to amend bill of complaint is here omitted, as it is identical with the motion to amend already printed on page 198 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the pleadings and recitals are the same, down to the interlocutory decree, as those printed on pages 199–201 in case No. 3849, Equity, they are here omitted. JAMES S. ALLEN, *Clerk.*]

On the eighteenth day of June, A. D. 1936, the following Interlocutory Decree on master's report and exceptions thereto is entered:

INTERLOCUTORY DECREE.

June 18, 1936.

MCLELLAN, J. This cause came on to be further heard at this term upon the master's report, the exceptions thereto and the entry of a decree, and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the exceptions of the plaintiff to the conclusions of the master contained in his report that the bond and any instruments purporting to be endorsements or extensions thereof are enforceable by the receiver be and the same hereby are sustained, and that all other exceptions of both parties to said report be and the same hereby are overruled; and it is further

Ordered, adjudged and decreed that except as aforesaid said report be and the same hereby is confirmed.

By the Court,

JOHN E. GILMAN, JR.,

Deputy Clerk.

June 18, 1936.

H. D. M.,

D. J.

Also on the said eighteenth day of June, A. D. 1936, the following Final Decree is entered:

FINAL DECREE.

June 18, 1936.

McLELLAN, J. The above-entitled cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is.

Ordered, adjudged and decreed that said bond and any instruments purporting to be endorsements or extensions thereof are void and unenforceable as against the plaintiff, and that the defendant bank and the defendant receiver be, and they hereby are, perpetually enjoined from enforcing or attempting to enforce the same against the plaintiff by suit or otherwise; it is further

Ordered, adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed; and it is further

Ordered, adjudged and decreed that the defendant receiver pay to the plaintiff its costs, in a sum to be taxed by the clerk, and that execution issue therefor. By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1931.
H. D. M.,
D. J.

MEMORANDUM.

March 18, 1936.

[MEMORANDUM. Copy of memorandum is here omitted, as it already appears printed on pages 139–141 of this volume, in case No. 5225, Law. JAMES S. ALLEN, *Clerk.*]

DEFENDANT'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.

[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it is identical with the one already printed on pages 146, 147 of this volume in case No. 5225, Law, except that the "defendants" file the motion in this case and not the "plaintiff". JAMES S. ALLEN, *Clerk.*]

MOTION FOR SEVERANCE OF ARTHUR D. CRONIN.

[Filed and allowed September 25, 1936.]

Now come Boston-Continental National Bank and Frederick S. Deitrick, receiver of Boston-Continental National Bank, aggrieved parties in the foregoing proceedings, who have claimed appeals to the United States Circuit Court of Appeals, and move a severance from Arthur D. Cronin, a possible party in interest in these proceedings who has not claimed an appeal.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS.

September 25, 1936. Allowed.

HUGH D. MCLELLAN,
D. J.

No. 3851, EQUITY DOCKET.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, Plaintiff.

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL., Defendants.

This cause was begun in the Superior Court for the County of Suffolk, District of Massachusetts, and was thence removed by the defendant to this United States District Court and was filed in this court on the eighteenth day of March, A. D. 1933, and is in the words and figures following:

RECORD OF STATE COURT.

[Filed in District Court March 18, 1933.]

(EXTRACTS.)

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To all Persons to whom these Presents shall come, GREETING:

Know Ye, That among our records of our Superior Court for the

said County of Suffolk it is thus contained, the following being the entire record in the case.

Commonwealth of Massachusetts

Suffolk, ss. Superior Court. In Equity.

Standard Surety & Casualty Company of New York, Plaintiff

vs.

Boston-Continental National Bank, and Westchester Discount Corporation, Defendants.

BILL OF COMPLAINT

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association legally established and existing under the laws of the United States of America, having its usual place of business in said Boston. The defendant Westchester Discount Corporation is a corporation established and existing under the laws of the State of New York having its usual place of business in Mount Vernon in the County of Westchester and State of New York.

3. The plaintiff is informed and believes and therefore avers that on or about December 20th, A. D. 1930 the defendant Westchester Discount Corporation and one Percy G. Cliff executed an instrument a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank executed and delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed marked B and made a part hereof.

Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed the instruments entitled "Endorsements" copies of which marked respectively C. and D. are hereto annexed and made parts hereof.

4. The plaintiff is informed and believes and therefore avers that all of the instruments aforesaid marked A. C. and D. were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or

intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said Cliff.

5. All of the instruments above described copies of which are hereto annexed marked A. C. and D. were executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instruments marked A. C. and D. or any of them by suit or otherwise.

2. That the said instruments marked A. C. and D. be declared null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

A.

No. $40,000.00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the

Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.) to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents. The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

SCHEDULE OF NOTES.

Date	Amount	Maturity
Dec. 20, 1930	$10,000.00	January 20, 1931
Dec. 20, 1930	10,000.00	February 20, 1931
Dec. 20, 1930	10,000.00	March 20, 1931
Dec. 20, 1930	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note, the obligee shall notify the home office of the Surety Company at 80 John Street, New York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION [SEAL]
By Joseph Stone, Treas.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff, Attorney-in-Fact.

B.

RELEASE.

Whereas, on the twentieth day of December, nineteen hundred and thirty, the Westchester Discount Corporation of Mount Vernon,

New York, as Principal, and the Standard Surety and Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having a usual place of business in Boston, as Surety, did execute a Bond to the Continental National Bank of Boston, wherein the said Westchester Discount Corporation as Principal and the Standard Surety and Casualty Company, as Surety, did bind themselves to the said Continental National Bank of Boston in the sum of forty thousand dollars, ($40,000.), to be paid to said Continental National Bank of Boston in the event that the said Westchester Discount Corporation should not, within four months from the date hereof, fully pay and discharge to the said Continental National Bank of Boston, the sum of forty thousand dollars ($40,000.) made on a series of promisory notes aggregating forty thousand dollars ($40,000.) made by said Westchester Discount Corporation to said Continental National Bank of Boston, bearing date December twentieth, nineteen hundred and thirty each in the amount of ($10,000.) ten thousand dollars, and maturing respectively on dates of January twentieth, nineteen hundred and thirty one, February twentieth, nineteen hundred and thirty-one, March twentieth, nineteen hundred and thirty-one and April twentieth, nineteen hundred and thirty-one.

And whereas said Westchester Discount Corporation has fully paid and discharged its obligations under said notes, now therefore, in consideration of the premises and of one dollar ($1.00) in hand, well and truly paid by said Surety Company to said Continental National Bank of Boston, receipt of which is hereby acknowledged, said Continental National Bank of Boston does hereby forever discharge, release and hold harmless, the said Surety Company from any liability whatsoever under, or in connection with, said bond.

In witness whereof, said Continental National Bank of Boston has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this twenty-third day of December, nineteen hundred and thirty.

CONTINENTAL NATIONAL BANK OF BOSTON [SEAL]
By Terrell M. Ragan.

Signed, sealed and delivered in the presence of
Witness

C.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Boston Branch Office: 33 Broad Street Percy G. Cliff, Manager
Telephone Hancock 8811 Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931, is hereby extended for a period of two months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of June 20th, 1931. In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston shall notify the home office of this Company at 80 John Street, New York City within five days by registered mail, of such default.

Witness our hand this twentieth day of April A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff Attorney-in-Fact

D.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Boston Branch Office, 33 Broad Street, Percy G. Cliff Manager
Telephone Hancock 8811 Boston, Mass

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series

of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931 and subsequently extended for a period of two months until June 20th, 1931, is now further extended for a period of six months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of December 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston, and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail, of such default.

Witness our hand this twentieth day of June A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff Attorney-in-Fact.

This bill was entered and filed in our said court on the twenty-third day of February, A. D. 1932, when and where the plaintiff appeared by Messrs. Stewart & Chase and James T. Connolly, Esq. its attorneys as aforesaid. And the following was endorsed on said bill, to wit:

Subpoena returnable April issued

. . . . . .

And on said nineteenth day of July, 1932, the following Plea of Boston Continental National Bank was filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. In Equity No. 39422

Standard Surety and Casualty Company of New York

v.

Boston-Continental National Bank and Westchester Discount Corporation

PLEA OF BOSTON-CONTINENTAL NATIONAL BANK

Now comes Boston-Continental National Bank and expressly reserving its right to file answer herein hereby pleads to the plaintiff's Bill of Complaint as follows:

The defendant, Boston-Continental National Bank, closed in the regular course of business on December 16, 1931 and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931 by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B. Cunningham receiver of said defendant bank on December 22, 1931 and said receiver duly qualified by filing bond in the amount of four hundred thousand dollars ($400,000) for the faithful performance of his duties; said John B. Cunningham is still acting as such receiver and has complete control over the assets and affairs of said defendant bank.

And said defendant bank further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the bill of complaint, because

First. John B. Cunningham, receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined nor named in the bill of complaint.

Second. The court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant, Boston-Continental National Bank moves that the bill be dismissed with costs.

By its Attorneys,

GOODWIN, PROCTER & HOAR.

Thereafter on the fifth day of December, 1932, the following rulings on pleas of defendant was handed down, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. In Equity.

No. 39422

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39423

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39424

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39425

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

RULINGS OF THE COURT ON PLEAS OF THE DEFENDANTS BOSTON-CONTINENTAL NATIONAL BANK, GORDON A. ROBINSON AND ARTHUR D. CRONIN.

These suits came on to be heard together by me on the pleas of the defendants Boston-Continental National Bank, Gordon A. Robinson and Arthur D. Cronin. It was agreed that the facts set up in the pleas are true and that I should pass upon the merits of the pleas as well as upon their sufficiency in law.

The pleas first raise the point that the receiver of the bank appointed by the Comptroller of the Currency is a necessary party. The receiver had been appointed before these suits were brought. All the assets of the bank are in the complete control of the receiver. This necessarily includes the bonds which these suits seek to have canceled. If these papers are to be delivered up for cancellation as prayed for, they must be delivered up by the receiver and not by the bank. The bank is powerless in the matter. Looking at the cases apart from the literal conception of the delivery up of papers to be canceled and treating the bills simply as attempts to have the bonds declared void by judicial fiat, the fact remains that these bonds, if valid, are assets of the receiver and not of the bank. An injunction against the bank would be futile unless it also bound the receiver. The suits seek to have declared void apparently valid assets in the hands of the receiver for which the receiver is accountable to the United States, whose officer he is. He is not an agent of the bank. The receiver and the bank are not to be treated by the law as if they were one and the same. See *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1. Unless therefore it can somehow be claimed that the receiver, though not a party to these suits and

though not obliged to assume their defence, will be bound by a decree against the bank, it is clear that the suits will prove fruitless and the trial of them will be a waste of time. The plaintiff has claimed that the receiver will be bound by any decree against the bank; but he cites in support of this proposition cases like *Bank of Bethel* v. *Pahquioque Bank,* 14 Wall. 383, where a proof of claim for a debt established in an action at law against the bank was held to bind the receiver to include this liability with other proved claims in making distribution. Cases so holding rest upon express provisions of the National Bank Act bringing about that result. They are quite unlike the cases at bar where the attempt is not to prove a claim as the basis of sharing a dividend, but to take from the receiver and destroy an apparent asset in his sole possession and control. This distinction is pointed out in *Barons* v. *First National Bank of Plainville,* 28 Fed. (2d) 615. If any of the cases cited by the plaintiff ignore the difference between the two classes of cases, it seems to me that they misapprehend the basis and limitations of the rule in the Bank of Bethel case. The Supreme Court of the United States itself has said (in a case where the plaintiff sought to set aside his stock subscription agreement for fraud) that as the rights of the receiver were involved, the only way in which the plaintiff could effectively raise the question was by a suit against the bank and the receiver. *Lantry* v. *Wallace,* 182 U. S. 536, 549. *Ryan* v. *Mt. Vernon National Bank,* 206 Fed. Rep. 452. If the receiver can be bound, though not a party, it must be because of some special rule applicable to this particular situation. There seems to be no need of any such special rule, and I am not convinced that it exists. I do not find anything to the contrary in *Earle* v. *Pennsylvania,* 178 U. S. 449. That case shows how a plaintiff can preserve a lien which he acquired under state law before the comptroller took possession of the bank. It is not like these cases. Most of the cases which I have seen concede the right of the plaintiffs to sue a receiver of this kind in the state court in the first instance, subject of course to any right of removal which the receiver may have. The receiver is, then, a party whose presence is necessary to any really effective prosecution of the suit, it is possible to make him a party, and no reason appears

for not having done so. He is a necessary party under ordinary principles of equity practice.

The second point taken in the pleas, as to jurisdiction, is probably unsound, but does not render the pleas bad. It is offered only as a deduction from the single set of facts pleaded, which in themselves state a defence to the suits.

It is therefore ordered that an interlocutory decree be entered in each case adjudging the pleas sufficient and allowing and sustaining the same.

STANLEY E. QUA,
Justice of the Superior Court.

On the ninth day of December, 1932, the following motion to join a party defendant and to amend bill of complaint was filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. In Equity No. 39422

Standard Surety & Casualty Company of New York, Plaintiff

vs.

Boston-Continental National Bank, and Westchester Discount Corporation, Defendants

MOTION TO JOIN A PARTY DEFENDANT AND TO AMEND BILL OF COMPLAINT

Now comes the plaintiff and moves to join John B. Cunningham, receiver of the defendant Boston-Continental National Bank, as a party defendant, and to amend its bill of complaint as follows:

1. By adding, in the heading thereto, after the name "Westchester Discount Corporation", and before the word "Defendants" the following:

> "John B. Cunningham, as he is receiver of said Boston-Continental National Bank."

2. By adding, after paragraph No. 2 of said bill of complaint the following:

> "The defendant John B. Cunningham is the duly qualified receiver of this defendant Boston-Continental National Bank ap-

pointed by the Comptroller of the Currency of the United States on December 22, 1931."

3. By adding to the end of paragraph No. 5 of the Bill of Complaint after the words "in the possession of the defendant bank" the words "or of the defendant John B. Cunningham as such receiver."

4. By adding in paragraph No. 2 of the prayer, after the words "the defendant bank" and before the words "be ordered to deliver them up to be cancelled", the words "and the defendant receiver."

By its Attorneys,
STEWART & CHASE,
JAMES T. CONNOLLY.

Attached to the foregoing motion is the following, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court. No. 39422

Standard Surety & Casualty Co. of N. Y., Plff.

vs.

Bos. Con. Nat. Bk. and Westchester Discount Corp., Deft.

I, Raymond Baldwin (attorney for) (in behalf of) the above named plaintiff make oath that on the ninth day of Dec. A. D. 1932, I gave notice in writing to the *the* defendant Bos. Con. Nat. Bk. and Wes. Dis. Corp. in the above entitled action that I should make a motion to Join a Receiver in the Equity Session, First Division of said court, at Boston on Monday the Nineteenth day of Dec. A. D. 1932, at 10 o'clock, in the forenoon, such notice was given by mailing a letter, postage prepaid, containing a copy of proposed motion directed to attorneys for Bos. Con. Nat. Bk. and Westchester Discount Corp.

GOODWIN, PROCTER, FIELD & HOAR,
84 State Street, Boston

R. BALDWIN.

Boston, Dec. 9, 1932

Subscribed and sworn to before me, E. Hazel Sullivan,
Notary Public

. . . . . .

Thereafter, on the twenty-fifth day of February, 1933, defendant's Petition for Removal of this action to the District Court of the United States for the District of Massachusetts is filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court. In Equity No. 39422

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Westchester Discount Corporation and John B. Cunningham, Receiver of Boston-Continental National Bank.

DEFENDANTS' PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

Now come your petitioners, Boston-Continental National Bank, Westchester Discount Corporation and John B. Cunningham, Receiver of Boston-Continental National Bank, appearing specially without submitting to the jurisdiction of the court but expressly contesting said jurisdiction, and respectfully represent as follows:

1. The defendant Boston-Continental National Bank is a national banking association duly organized and existing under the laws of the United States with a place of business at Boston in said County; said bank closed in the regular course of business on December 16, 1931 and did not open thereafter; on December 17, 1931 the Comptroller of the Currency of the United States in accordance with law took charge of the assets of said bank for the purpose of winding up its affairs; on December 22, 1931, said Comptroller appointed the defendant, John B. Cunningham receiver of said bank and he duly qualified by executing bond for the faithful performance of his duties as such receiver in the amount of $400,000; thereafter, to wit, on the 23rd day of February, 1932 a bill in equity was filed in the Superior Court for Suffolk County by Standard Surety & Casualty Company of New York against said Boston-Continental National Bank and Westchester Discount Corporation and while the affairs of said bank were in the hands of said receiver; that said receiver was not joined as party defendant and the bill of complaint did not disclose the fact that said bank had ceased to do business

prior to the filing of the bill and that its affairs were in the hands of a receiver for the purpose of liquidation.

2. Thereafter the defendants Boston-Continental National Bank and Westchester Discount Corporation filed in this court petition and bond for removal of the cause to the United States District Court for the District of Massachusetts and the case was duly entered in said United States District Court. Thereafter the plaintiff filed a motion to remand the case to this court on the ground that the receiver of Boston-Continental National Bank was not joined as party defendant; said motion to remand was granted after hearing and the case was remanded to this court.

3. Thereafter the defendant Boston-Continental National Bank filed by leave of court a special plea to the bill on the ground that the receiver of Boston-Continental National Bank was a necessary party defendant and that the court had no jurisdiction to enter a decree as prayed for against said bank. After hearing on said motion, this court entered an order that an interlocutory decree be entered adjudging the plea sufficient and allowing and sustaining the same.

4. Thereafter the plaintiff filed a motion to join John B. Cunningham, as he is receiver of Boston-Continental National Bank, as party defendant and to amend its bill of complaint. Said motion was allowed by this court and process issued against John B. Cunningham, receiver of Boston-Continental National Bank, returnable to this court on the first Monday of February, 1933.

5. This cause is a suit in equity to cancel a certain indemnity bond in the principal amount of $40,000 now held by John B. Cunningham as receiver as an asset of said Boston-Continental National Bank; it is a suit arising under the Constitution and laws of the United States and is a case for the winding up the affairs of said Boston-Continental National Bank; the District Court of the United States for the District of Massachusetts has original jurisdiction of this case under Section 24 of the Judicial Code of the United States.

6. Your petitioners desire to remove this suit before trial thereof into the District Court of the United States to be holden in the District of Massachusetts.

7. And your petitioners offer and file herewith good and sufficient bond for their entry in the District Court of the United States for the District of Massachusetts within thirty days from the date of the filing of this petition of a certified copy of the record in this suit and for the payment of all costs that may be awarded by said District Court of the United States if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

8. And your petitioners further represent that written notice of this petition and the bond for removal hereinbefore referred to has been given to the adverse party prior to the filing of the same by sending said notice to Stewart & Chase, 1 Federal Street, Boston, Massachusetts, whose names appear as attorneys for the adverse party on the subpoenas served in this case.

9. And your petitioners therefore pray that said bond may be accepted and that said suit may be removed to the next District Court of the United States to be held in the District of Massachusetts pursuant to the statutes of the United States in such cases made and provided, and that no further proceeding may be had in this court.

BOSTON-CONTINENTAL NATIONAL BANK,
By John B. Cunningham, Receiver

WESTCHESTER DISCOUNT CORPORATION,
By A. G. Gould, Attorney

JOHN B. CUNNINGHAM,
As he is Receiver of Boston-Continental National Bank.

Commonwealth of Massachusetts

Suffolk, ss. February 21, 1933.

Then personally appeared John B. Cunningham and made oath that the foregoing petition by him subscribed is true to the best of his knowledge, information and belief. Before me,

MURRAY F. HALL, [SEAL]
Notary Public

And on said twenty-fifth day of February, 1933, the following Bond is filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity No. 39422

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Westchester Discount Corporation and John B. Cunningham, Receiver of Boston-Continental National Bank

REMOVAL BOND

Know all Men by these Presents

That Boston-Continental National Bank, a national banking association duly organized by law with an usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts and John B. Cunningham, as he is Receiver of said Boston-Continental National Bank, are jointly and severally held and firmly bound unto Standard Surety & Casualty Company of New York, a corporation duly organized by law and having its principal place of business in the City and State of New York in the penal sum of five hundred dollars ($500), to the payment whereof well and truly to be made unto the said Standard Surety & Casualty Company of New York, its successors and assigns, they jointly and severally bind themselves and their respective successors and assigns.

The condition of this bond is that

Whereas Boston-Continental National Bank, Westchester Discount Corporation and John B. Cunningham, as he is Receiver of Boston-Continental National Bank, have petitioned the Superior Court within and for the County of Suffolk and Commonwealth of Massachusetts for the removal of a certain suit in equity pending in said County wherein Standard Surety & Casualty Company of New York is plaintiff, and Boston-Continental National Bank, Westchester Discount Corporation and John B. Cunningham, as he is Receiver of Boston-Continental National Bank, are defendants to the District Court of the United States for the District of Massachusetts;

Now if said defendants, or any one of them, shall enter in said District Court of the United States for the District of Massachusetts within thirty days from the date of the petition filed herewith a certi-

fied copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States for the District of Massachusetts if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to be in full force and effect.

In witness whereof said Boston-Continental National Bank has caused these presents to be signed and its corporate seal to be hereunto affixed by John B. Cunningham, its receiver thereunto duly authorized, and John B. Cunningham, as he is receiver of Boston-Continental National Bank, has hereunto placed his hand and seal all on this 21st day of February, 1933.

BOSTON-CONTINENTAL NATIONAL BANK, [SEAL]
By John B. Cunningham, Receiver

JOHN B. CUNNINGHAM,
As he is Receiver of Boston-Continental National Bank.

And the following are endorsed on said Bond for Removal, to wit:

This bond may be approved Stewart & Chase

Feb. 25, 1933.

Bond accepted by the court. Qua, *J.*

Attest: CLESSON S. CURTICE, Asst. Clerk.

And the following are endorsed on said Petition for Removal, to wit:

This bond [Petition] may be approved [allowed] Stewart & Chase

Feb. 25, 1933.

Bond [Petition] accepted by the court. Qua, *J.*

Attest: CLESSON S. CURTICE, Asst. Clerk.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, WALTER PERLEY HALL, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this

eleventh day of March, in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL] FRANCIS A. CAMPBELL, *Clerk*

Commonwealth of Massachusetts

Suffolk, ss. Superior Court No. 39422 Eq.

DOCKET ENTRIES

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank and Another

Counsel for Complainant	Counsel for Respondent
Stewart & Chase	1932 April 25 Goodwin, Procter
1 Federal Street	& Hoar, 84 State St.

Bill entered Feb. 23, 1932, Subpoena returnable April issued.

Apr. 4, Subpoena returned (1)

April 25, Defendants' petition for removal to District Court of the United States District Court of Massachusetts (2) approved

April 25, Removal Bond (3)

May 2, Copies prepared for District Court of the United States for the District of Massachusetts.

July 5, Remanded to state court (See paper No. 4)

July 19, Motion of defendant to file plea reserving its answer (4) allowed

July 19, Plea of Boston Continental National Bank (5)

Dec. 5, Rulings on pleas of defendants (Qua, *J.*) (6)

Dec. 9, Motion to join party defendant and to amend bill (7)

Dec. 19, Motion (paper No. 7) and allowed and process ordered; Subpoena returnable February & issued.

1933 Jan. 10, Subpoena returned (8)

Feb. 25, Defendants' petition for removal to District Court of United States for District of Massachusetts (9) accepted.

Feb. 25, Removal Bond (10)

Mar. 11, Copies prepared for District Court of the United States for the District of Massachusetts.

(March 11, A. D. 1933)

Copy.

Attest: FRANCIS A. CAMPBELL, *Clerk.*

[MEMORANDUM. Certain parts omitted from the State Court Record pursuant to directions contained in the praecipe of the Boston Continental National Bank and the Receiver. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term of this court, A. D. 1933, when, to wit, April 14, 1933, the following Answer of Boston-Continental National Bank et al. was filed:

ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

[Filed April 14, 1933.]

Now come Boston-Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint say as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint, they say that the instrument, a copy whereof is attached to the bill of complaint marked "A", was duly executed by Westchester Discount Corporation by Joseph Stone, its treasurer, and was duly executed by the plaintiff, by Percy G. Cliff, its attorney-in-fact, and that an attested copy of said Cliff's general power of attorney was attached to the original instrument; that thereafter the plaintiff duly executed the instruments entitled "Endorsements" by said Cliff, its attorney-in-fact, copies of which endorsements are attached to the bill of complaint marked "C" and "D"; that if a purported release was delivered to said Cliff by Continental National Bank by Terrell M. Ragan in the form attached to the bill of complaint marked "B", such purported release was delivered without authority of the board of directors of said Continental National Bank, was executed without consideration and is voidable and void. Except as aforesaid, they deny the allegations contained in said paragraph 3 of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A" as extended by instruments, copies of which are attached to the bill of complaint marked "C" and "D", has been broken in that Westchester Discount Corporation, the principal named in said instrument, has not paid the notes described therein according to their terms, but on the contrary has failed, refused and declined to pay said notes and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, the successors to the obligee described therein, to payment in full of said notes; that the plaintiff was duly notified of the default in accordance with the provisions of the said instrument; that the damages sustained by these defendants on account of the default of said Westchester Discount Corporation are in excess of $40,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, January 31, 1935, the following Motion of Receiver to be Substituted as Party Defendant was filed and allowed by the court:

MOTION OF FREDERICK S. DEITRICK, RECEIVER, TO BE SUBSTITUTED AS PARTY DEFENDANT.

[Filed January 31, 1935.]

[MEMORANDUM. Copy of motion to be substituted as party defendant is here omitted as it is identical with the motion already printed in this volume on page 195 in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

At the same term, to wit, February 2, 1935, a motion for a master was filed by defendants, Boston-Continental National Bank and Frederick S. Deitrick, receiver.

On the fourth day of said February, the following Order Appointing Special Master was entered:

ORDER APPOINTING SPECIAL MASTER.

February 4, 1935.

[MEMORANDUM. Copy of order appointing special master is here omitted, as it already appears printed on page 196, 197 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the notice of receiver to admit facts and answer of Standard Surety & Casualty Company to receiver's notice to admit facts are the same as those already printed on pages 27–35 of this volume, in case No. 5225 Law; they are here omitted. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term, A. D. 1935, when, to wit, April 10, 1935, the following Motion to Amend Bill of Complaint was filed and allowed:

MOTION TO AMEND BILL OF COMPLAINT.

[Filed and allowed April 10, 1935.]

[MEMORANDUM. Copy of motion to amend bill of complaint is here omitted, as it is identical with the motion to amend already printed on page 198 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

At the same term, to wit, June 6, 1935, the following Master's and Auditor's Report together with Exhibits was filed:

MASTER'S AND AUDITOR'S REPORT.

[Filed June 6, 1935.]

EXHIBITS.

[MEMORANDUM. Copy of master's and auditor's report and exhibits are here omitted as they will be found printed on pages 42–129 of this volume in case No. 5225, Law. JAMES S. ALLEN, *Clerk.*]

On the fourteenth of said June the following Respondent's Exceptions to Master's Report were filed:

RESPONDENT'S EXCEPTIONS TO MASTER'S REPORT.

[Filed June 14, 1935.]

Now comes the Boston-Continental National Bank and Frederick S. Deitrick, receiver, respondents in the above-entitled cause and file the following exceptions to the report of the master filed herein on June 6, 1935 to wit:

1. To the ruling of the master that the Westchester bond dated December 20, 1930, and "endorsements" do not secure payment of the note of forty thousand dollars ($40,000) of Westchester Discount Corporation dated December 23, 1930, and that there can be no recovery on this bond or the "endorsements". (Master's report, pages 40, 41 and 49.)

By their Attorneys,

GOODWIN, PROCTER & HOAR

[MEMORANDUM. Inasmuch as the pleadings and recitals are the same, down to the interlocutory decree, as those printed on pages 200, 201 of this volume, in case 3849 Equity, they are here omitted. JAMES S. ALLEN, *Clerk.*]

On the eighteenth day of June, A. D. 1936, the following Interlocutory Decree on Master's Report and exceptions thereto is entered:

INTERLOCUTORY DECREE.

June 18, 1936.

MCLELLAN, J. This cause came on to be further heard at this term upon the master's report, the exceptions thereto and the entry of a decree, and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the exceptions of the plaintiff to the conclusions of the master contained in his report that the bond and any instruments purporting to be endorsements or extensions thereof are enforceable by the receiver be and the same hereby are sustained, and that all other exceptions of both parties to said report be and the same hereby are overruled; and it is further

Ordered, adjudged and decreed that except as aforesaid said report be and the same hereby is confirmed.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1936.
H. D. M.,
D. J.

Also on the said eighteenth day of June A. D. 1936, the following Final Decree is entered:

FINAL DECREE.
June 18, 1936.

MCLELLAN, J. The above-entitled cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that said bond and any instruments purporting to be endorsements or extensions thereof are void and unenforceable as against the plaintiff, and that the defendant bank and the defendant receiver be, and they hereby are, perpetually enjoined from enforcing or attempting to enforce the same against the plaintiff by suit or otherwise; it is further

Ordered, adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed; and it is further

Ordered, adjudged and decreed that the defendant receiver pay to the plaintiff its costs, in a sum to be taxed by the clerk and that execution issue therefor.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1936.

HUGH D. MCLELLAN,
D. J.

MEMORANDUM.
March 18, 1936.

[MEMORANDUM. Copy of memorandum is here omitted as it already appears printed on pages 139–141 of this volume, in case No. 5225, Law. JAMES S. ALLEN, *Clerk.*]

DEFENDANT'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.
[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it is identical with the one already printed on pages 146, 147 of this volume, in case No. 5225, Law, except that the "defendant" files the motion in this case and not the "plaintiff". JAMES S. ALLEN, *Clerk.*]

MOTION FOR SEVERANCE OF WESTCHESTER DISCOUNT CORPORATION.
[Filed and allowed September 25, 1936.]

Now come Boston-Continental National Bank and Frederick S. Deitrick, receiver of Boston-Continental National Bank, aggrieved parties in the foregoing proceedings, who have claimed appeals to the United States Circuit Court of Appeals, and move a severance from Westchester Discount Corporation, a possible party in interest in these proceedings who has not claimed an appeal.

By their Attorneys,
GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS

September 25, 1936. Allowed.

HUGH D. MCLELLAN,
D. J.

No. 3852, Equity Docket.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, Plaintiff

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL., Defendants.

This cause was begun in the Superior Court for the County of Suffolk, District of Massachusetts, and was thence removed by the defendant to this United States District Court and was filed in this court on the eighteenth day of March, A. D. 1933, and is in the words and figures following:

RECORD OF STATE COURT.

[Filed in District Court March 18, 1933.]

(EXTRACTS.)

Commonwealth of Massachusetts.

SUFFOLK, ss.

To all Persons to whom these Presents shall come, GREETING: Know ye, That among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case.

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity

Standard Surety & Casualty Company of New York, Plaintiff,

vs.

Boston-Continental National Bank and Gordon A. Robinson, Defendants.

BILL OF COMPLAINT

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association legally established and existing under the laws of the United States of America, having its usual place of business in said

Boston. The defendant Gordon A. Robinson is a resident of said Boston.

3. The plaintiff is informed and believes and therefore avers that on or about July 8th, A. D. 1931 the defendant Gordon A. Robinson and one Percy G. Cliff executed an instrument, a copy of which is hereto annexed marked A and made a part hereof. Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed another instrument purporting to be an "Endorsement" of said instrument first named extending the terms and provisions thereof to July 8th, 1932, a more particular description of which said "Endorsement" is to the plaintiff unknown.

4. The plaintiff is informed and believes and therefore avers that the instrument a copy of which is hereto annexed marked A and the instrument hereinabove described purporting to be an "Endorsement" were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said Cliff.

5. The instrument a copy of which is hereto annexed marked A and the "Endorsement" thereof above described were executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the instrument a copy of which is hereto annexed marked A by suit or otherwise.

2. That the said instrument and any instrument purporting to be

an "Endorsement" or extension thereof be declared null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

By its attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

A.

No. 12420–31 $20,000.00

Know all Men by these Presents, That we, Gordon A. Robinson of Boston in the County of Suffolk and the Commonwealth of Massachusetts, doing business as Robinson Engineering Company, as principal, and the Standard Surety and Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking corporation duly organized under the laws of the United States of America and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of twenty thousand dollars ($20,000.00), to be paid to said Boston Continental National Bank, as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if Gordon A. Robinson shall, within four months from date hereof, make to the Boston Continental National Bank, full and true payment of note in the amount of twenty thousand dollars ($20,000), maturing November eighth, nineteen hundred and thirty-one, or of any extension thereof, in the whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, the obligee shall notify the home office of such surety at 80 John Street, New York City, New York, within ten (10) days, by registered mail, of such default and the Surety Company shall, within thirty (30) days,

pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at the time of default, four months from date hereof and in no event exceeding twenty thousand dollars ($20,000.00); the liability of the surety with respect to any such extension or renewal, in no event to extend beyond date of July eighth, nineteen hundred thirty-two.

Witness our hands and seals and dated this eighth day of July A. D. 1931.

GORDON A. ROBINSON,
D/B as Robinson Engineering Co.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff, Attorney-in-fact

This bill was entered and filed in our said court on the twenty-third day of February, A. D. 1932, when and where the plaintiff appeared by Messrs. Stewart & Chase and James T. Connolly, Esq., its attorneys as aforesaid. And the following was endorsed on said bill, to wit:

"Subp. ret. April issued."

And on said nineteenth day of July, 1932, the following Plea of Boston Continental National Bank was filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. In Equity No. 39423

Standard Surety and Casualty Company of New York

v.

Boston-Continental National Bank and Gordon A. Robinson

PLEA OF BOSTON-CONTINENTAL NATIONAL BANK

Now comes Boston-Continental National Bank and expressly reserving its right to file answer herein hereby pleads to the plaintiff's Bill of Complaint as follows:

The defendant, Boston-Continental National Bank, closed in the regular course of business on December 16, 1931, and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931 by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B.

Cunningham receiver of said defendant bank on December 22, 1931 and said receiver duly qualified by filing bond in the amount of four hundred thousand dollars ($400,000) for the faithful performance of his duties; said John B. Cunningham is still acting as such receiver and has complete control over the assets and affairs of said defendant bank.

And said defendant bank further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the Bill of Complaint, because

First. John B. Cunningham, receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined nor named in the Bill of Complaint.

Second. The court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant, Boston-Continental National Bank moves that the bill be dismissed with costs.

By its Attorneys,

GOODWIN, PROCTER & HOAR.

Also on said nineteenth day of July, 1932, the following plea of Gordon A. Robinson was filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. In Equity No. 39423

Standard Surety and Casualty Company of New York

vs.

Boston-Continental National Bank and Gordon A. Robinson

PLEA OF GORDON A. ROBINSON

Now comes Gordon A. Robinson and expressly reserving his right to file answer herein hereby pleads to the plaintiff's Bill of Complaint as follows:

The defendant, Boston-Continental National Bank closed in the regular course of business on December 16, 1931, and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931 by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B. Cun-

ningham receiver of said defendant bank on December 22, 1931, and said receiver duly qualified by filing bond in the amount of four hundred thousand dollars ($400,000) for the faithful performance of his duties; said John B. Cunningham is still acting as such receiver and has complete control over the assets and affairs of said defendant bank.

The defendant Gordon A. Robinson further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the Bill of Complaint because

First: John B. Cunningham, receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined or named in the Bill of Complaint.

Second. The court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant Gordon A. Robinson moves that the bill be dismissed with costs.

By his attorney,
DANIEL A. SHEA.

And the court endorsed the following on said Plea, to wit:

"July 19, 1932 May be filed. Whiting *J.*"

Thence the suit was continued unto the fifth day of December, 1932 when on said day, the following rulings on plea of defendants was handed down, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity

No. 39422

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39423

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39424

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39425

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

RULINGS OF THE COURT ON PLEAS OF THE DEFENDANTS BOSTON-CONTINENTAL NATIONAL BANK, GORDON A. ROBINSON AND ARTHUR D. CRONIN

These suits came on to be heard together by me on the pleas of the defendants Boston-Continental National Bank, Gordon A. Robinson and Arthur D. Cronin. It was agreed that the facts set up in the pleas are true and that I should pass upon the merits of the pleas as well as upon their sufficiency in law.

The pleas first raise the point that the receiver of the bank appointed by the Comptroller of the Currency is a necessary party. The receiver had been appointed before these suits were brought. All the assets of the bank are in the complete control of the receiver. This necessarily includes the bonds which these suits seek to have canceled. If these papers are to be delivered up for cancellation as prayed for, they must be delivered up by the receiver and not by the bank. The bank is powerless in the matter. Looking at the cases apart from the literal conception of the delivery up of papers to be canceled and treating the bills simply as attempts to have the bonds declared void by judicial fiat, the fact remains that these bonds, if valid, are assets of the receiver and not of the bank. An injunction against the bank would be futile unless it also bound the receiver. The suits seek to have declared void apparently valid assets in the hands of the receiver for which the receiver is accountable to the United States, whose officer he is. He is not an agent of the bank. The receiver and the bank are not to be treated by the law as if they were one and the same. See *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1. Unless therefore it can somehow be claimed that the receiver, though not a party to these suits and

though not obliged to assume their defence, will be bound by a decree against the bank, it is clear that the suits will prove fruitless and the trial of them will be a waste of time. The plaintiff has claimed that the receiver will be bound by any decree against the bank; but he cites in support of this proposition cases like *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall 383, where a proof of claim for a debt established in an action at law against the bank was held to bind the receiver to include this liability with other proved claims in making distribution. Cases so holding rest upon express provisions of the National Bank Act bringing about that result. They are quite unlike the cases at bar where the attempt is not to prove a claim as the basis of sharing a dividend, but to take from the receiver and destroy an apparent asset in his sole possession and control. This distinction is pointed out in *Barons* v. *First National Bank of Plainville*, 28 Fed. (2d) 615. If any of the cases cited by the plaintiff ignore the difference between the two classes of cases, it seems to me that they misapprehend the basis and limitations of the rule in the Bank of Bethel case. The Supreme Court of the United States itself has said (in a case where the plaintiff sought to set aside his stock subscription agreement for fraud) that as the rights of the receiver were involved, the only way in which the plaintiff could effectively raise the question was by a suit against the bank and the receiver. *Lantry* v. *Wallace*, 182 U. S. 536, 549. *Ryan* v. *Mt. Vernon National Bank*, 206 Fed. Rep. 452. If the receiver can be bound, though not a party, it must be because of some special rule applicable to this particular situation. There seems to be no need of any such special rule, and I am not convinced that it exists. I do not find anything to the contrary in *Earle* v. *Pennsylvania*, 178 U. S. 449. That case shows how a plaintiff can preserve a lien which he acquired under state law before the comptroller took possession of the bank. It is not like these cases. Most of the cases which I have seen concede the right of the plaintiffs to sue a receiver of this kind in the state court in the first instance, subject of course to any right of removal which the receiver may have. The receiver is, then, a party whose presence is necessary to any really effective prosecution of the suit, it is possible to make him a party, and no reason appears

for not having done so. He is a necessary party under ordinary principles of equity practice.

The second point taken in the pleas, as to jurisdiction, is probably unsound, but does not render the pleas bad. It is offered only as a deduction from the single set of facts pleaded, which in themselves state a defence to the suits.

It is therefore ordered that an interlocutory decree be entered in each case adjudging the pleas sufficient and allowing and sustaining the same.

STANLEY E. QUA,
Justice of the Superior Court

Subsequently on the ninth day of December, 1932, plaintiff's motion to join a party defendant and to amend Bill of Complaint was filed, as follows, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. In Equity. No. 39423

Standard Surety & Casualty Company of New York, Plaintiff

vs.

Boston Continental National Bank, and Gordon A. Robinson, Defendants.

MOTION TO JOIN A PARTY DEFENDANT AND TO AMEND BILL OF COMPLAINT.

Now comes the plaintiff and moves to join John B. Cunningham, receiver of the defendant Boston Continental National Bank, as a party defendant, and to amend its Bill of Complaint as follows:

1. By adding, in the heading thereto, after the name "Gordon A. Robinson", and before the word "Defendants" the following:

> "John B. Cunningham, as he is Receiver of said Boston Continental National Bank."

2. By adding, after paragraph No. 2 of said Bill of Complaint the following:

> "The defendant John B. Cunningham is the duly qualified receiver of this defendant Boston Continental National Bank appointed by the Comptroller of the Currency of the United States on December 23, 1931."

3. By adding to the end of paragraph No. 5 of the Bill of Complaint after the words "in the possession of the defendant bank" the words "or of the defendant John B. Cunningham as such receiver."

4. By adding in paragraph No. 2 of the prayer, after the words "the defendant bank" and before the words "be ordered to deliver them up to be cancelled", the words "and the defendant receiver."

By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

Attached to said motion is the following, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. No. 39423

Standard Surety & Casualty Co. of N. Y. Plff. *vs.* Bos. Con. Nat. Bk. and Gordon A. Robinson Deft.

AFFIDAVIT OF NOTICE OF MOTION.

I, Raymond Baldwin (Attorney for) (in behalf of) the above named plaintiff make oath that on the ninth day of Dec. A. D. 1932, I gave notice in writing to the *the* defendant Bos. Con. Nat. Bk. and J. Stone in the above entitled action that I should make a motion to Join a Receiver in the Equity Session, First Division of said court, at Boston on Monday the Nineteenth day of Dec. A. D. 1932, at 10 o'clock in the forenoon, such notice was given by mailing a letter, postage prepaid, containing a copy of proposed motion directed to Attorneys for Bos. Con. Nat. Bk. and Attorney for Gordon A. Robinson.

Goodwin, Procter, Field & Hoar
84 State Street, Boston

Daniel A. Shea,
1 State Street, Boston

R. BALDWIN

Boston, December 9, 1932

Subscribed and sworn to before me,

E. Hazel Sullivan
Notary Public

And the following were endorsed on said motion, to wit:

"Subp. ret. Feb. issd."

"(F. T. Hammond *J.*)

Suffolk, ss., Boston Dec. 19, 1932

Allowed by the Court & process to issue.

Attest: Leo A. Reed, Asst. Clerk."

Thereafter, on the twenty-fifth day of February, 1933, defendants' Petition for Removal of this action to the District Court of the United States for the District of Massachusetts is filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity No. 39423

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Gordon A. Robinson and John B. Cunningham, Receiver of Boston-Continental National Bank.

DEFENDANTS' PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

Now come your petitioners, Boston-Continental National Bank, Gordon A. Robinson and John B. Cunningham, receiver of Boston-Continental National Bank, appearing specially without submitting to the jurisdiction of the court but expressly contesting said jurisdiction, and respectfully represent as follows:

1. The defendant Boston-Continental National Bank is a national banking association duly organized and existing under the laws of the United States with a place of business at Boston in said County; said bank closed in the regular course of business on December 16, 1931 and did not open thereafter; on December 17, 1931, the Comptroller of the Currency of the United States in accordance with law took charge of the assets of said bank for the purpose of winding up its affairs; on December 22, 1931, said comptroller appointed the defendant, John B. Cunningham, receiver of said bank and he duly qualified by executing bond for the faithful performance of his duties as such receiver in the amount of $400,000; thereafter, to wit, on the 23rd day of February, 1932 a bill in equity was filed in

the Superior Court for Suffolk County by Standard Surety & Casualty Company of New York against said Boston-Continental National Bank and Gordon A. Robinson and while the affairs of said bank were in the hands of said receiver; that said receiver was not joined as party defendant and the bill of complaint did not disclose the fact that said bank had ceased to do business prior to the filing of the bill and that its affairs were in the hands of a receiver for the purpose of liquidation.

2. Thereafter the defendants Boston-Continental National Bank and Gordon A. Robinson filed in this court petition and bond for removal of the cause to the United States District Court for the District of Massachusetts and the case was duly entered in said United States District Court. Thereafter the plaintiff filed a motion to remand the case to this court on the ground that the receiver of Boston-Continental National Bank was not joined as party defendant; said motion to remand was granted after hearing and the case was remanded to this court.

3. Thereafter the defendants filed by leave of court a special plea to the bill on the ground that the receiver of Boston-Continental National Bank was a necessary party defendant and that the court had no jurisdiction to enter a decree as prayed for against said bank. After hearing on said motion, this court entered an order that an interlocutory decree be entered adjudging the plea sufficient and allowing and sustaining the same.

4. Thereafter the plaintiff filed a motion to join John B. Cunningham, as he is receiver of Boston-Continental National Bank, as party defendant and to amend its bill of complaint. Said motion was allowed by this court and process issued against John B. Cunningham, receiver of Boston-Continental National Bank, returnable to this court on the first Monday of February, 1933.

5. This cause is a suit in equity to cancel a certain indemnity bond in the principal amount of $20,000 now held by John B. Cunningham as receiver as an asset of said Boston-Continental National Bank; it is a suit arising under the Constitution and laws of the United States and is a case for the winding up the affairs of said Boston-Continental National Bank; the District Court of the United States for the

District of Massachusetts has original jurisdiction of this case under Section 24 of the Judicial Code of the United States.

6. Your petitioners desire to remove this suit before trial thereof into the District Court of the United States to be holden in the District of Massachusetts.

7. And your petitioners offer and file herewith good and sufficient bond for their entry in the District Court of the United States for the District of Massachusetts within thirty days from the date of the filing of this petition of a certified copy of the record in this suit and for the payment of all costs that may be awarded by said District Court of the United States if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

8. And your petitioners further represent that written notice of this petition and the bond for removal hereinbefore referred to has been given to the adverse party prior to the filing of the same by sending said notice to Stewart & Chase, 1 Federal Street, Boston, Massachusetts, whose names appear as attorneys for the adverse party on the subpoenas served in this case.

9. And your petitioners therefore pray that said bond may be accepted and that said suit may be removed to the next District Court of the United States to be held in the District of Massachusetts pursuant to the statutes of the United States in such cases made and provided, and that no further proceeding may be had in this court.

BOSTON-CONTINENTAL NATIONAL BANK,
By John B. Cunningham, Receiver

GORDON A. ROBINSON,
by D. A. Shea, Atty.

JOHN B. CUNNINGHAM,
As he is Receiver of Boston-Continental National Bank.

Commonwealth of Massachusetts.

Suffolk, ss. February 21, 1933.

Then personally appeared John B. Cunningham and made oath that the foregoing petition by him subscribed is true to the best of his knowledge, information and belief. Before me,

MURRAY F. HALL [SEAL]
Notary Public.

And on said twenty-fifth day of February, 1933, the following Bond on Removal is filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity No. 39423

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Gordon A. Robinson and John B. Cunningham, Receiver of Boston-Continental National Bank.

REMOVAL BOND.

Know all Men by these Presents

That Boston-Continental National Bank, a national banking association duly organized by law with an usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, and John B. Cunningham, as he is Receiver of said Boston-Continental National Bank, are jointly and severally held and firmly bound unto Standard Surety & Casualty Company of New York, a corporation duly organized by law and having its principal place of business in the City and State of New York, in the penal sum of Five Hundred Dollars ($500), to the payment whereof well and truly to be made unto the said Standard Surety & Casualty Company of New York, its successors and assigns, they jointly and severally bind themselves and their respective successors and assigns.

The condition of this bond is that

Whereas Boston-Continental National Bank, Gordon A. Robinson and John B. Cunningham, as he is receiver of Boston-Continental National Bank, have petitioned the Superior Court within and for the County of Suffolk and Commonwealth of Massachusetts for the removal of a certain suit in equity pending in said County wherein Standard Surety & Casualty Company of New York is plaintiff, and Boston-Continental National Bank, Gordon A. Robinson and John B. Cunningham, as he is receiver of Boston-Continental National Bank, are defendants to the District Court of the United States for the District of Massachusets;

Now if said defendants, or any one of them, shall enter in said District Court of the United States for the District of Massachusetts

within thirty days from the date of the petition filed herewith a certified copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States for the District of Massachusetts if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to be in full force and effect.

In witness whereof said Boston-Continental National Bank has caused these presents to be signed and its corporate seal to be hereunto affixed by John B. Cunningham, its receiver thereunto duly authorized, and John B. Cunningham, as he is receiver of Boston-Continental National Bank, has hereunto placed his hand and seal all on this 21st day of February, 1933.

BOSTON-CONTINENTAL NATIONAL BANK, [SEAL]
By John B. Cunningham, Receiver

JOHN B. CUNNINGHAM,
As he is Receiver of Boston-Continental National Bank

And the following are endorsed on said Bond for Removal, to wit:

"This bond may be approved Stewart & Chase"

"Feb. 25, 1933.

Bond accepted by the court. Qua *J.*

Attest: CLESSON S. CURTICE, Asst. Clerk."

And the following are endorsed on said Petition for Removal, to wit:

"This petition may be allowed Stewart & Chase"

"Feb. 25, 1933.

Petition accepted by the court. Qua *J.*

Attest: CLESSON S. CURTICE, Asst. Clerk."

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, WALTER PERLEY HALL, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this elev-

enth day of March, in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL] FRANCIS A. CAMPBELL, *Clerk.*

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. No. 39423.

DOCKET ENTRIES.

Standard Surety & Casualty Company of New York

vs.

Boston Continental National Bank and Another

Counsel for Complainant	Counsel for Respondent
Stewart & Chase	1932, April 25
1 Federal Street	Goodwin, Procter & Hoar
	84 State St.

Bill entered Feb. 23, 1932, Subpoena returnable April issued.

Mar. 24, Subpoena returned (1)

Apr. 25, Defendants' petition for removal to District Court of United States for Massachusetts (2) accepted

Apr. 25, Removal Bond (3)

1932, May 2, Copies prepared for District Court of the United States for the District of Massachusetts

July 5, Remanded to State Court (4)

July 19, Motion of Boston-Continental National Bank leave to file plea (5) allowed

July 19, Plea of Boston Continental National Bank (6)

July 19, Plea of Robinson (7)

Dec. 5, Rulings on pleas of defendants (Qua J.) (See paper No. 6 in Eq. No. 39422)

Dec. 9, Motion to join party defendant and to amend bill (8)

Dec. 19, Motion (paper No. 8) allowed and process ordered and Subpoena returnable February and issued

1933, Jan. 10, Subpoena returned (9)

Feb. 25, Defendants' petition for removal to District Court of the United States for District of Massachusetts (10) accepted

Feb. 25, Removal Bond (11)

Mar. 11, Copies prepared for District Court of the United States for the District of Massachusetts.

(March 11, A. D. 1933)

Copy.

Attest: FRANCIS A. CAMPBELL, *Clerk*.

[MEMORANDUM. Certain parts omitted from the State Court Record pursuant to directions contained in the praecipe of the Boston-Continental National Bank and the Receiver. JAMES S. ALLEN, *Clerk*.]

This cause was thence continued to the March Term of this court, A. D. 1933, when, to wit, April 14, 1933, the following Answer of Boston-Continental National Bank et al. was filed:

ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

[Filed April 14, 1933.]

Now come Boston-Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint say as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint they say that the instrument, copy whereof is attached to the bill of complaint marked "A", was duly executed by Gordon A. Robinson, D/B as Robinson Engineering Company and was duly executed by the plaintiff by Percy G. Cliff, its attorney-in-fact; that they are ignorant as to whether said Cliff executed another instrument purporting to be an endorsement. Except as aforesaid, they deny the allegations contained in the third paragraph of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A", has been broken in that Gordon A. Robinson has not paid the note described therein according to its terms, except the sum of $1,003.15, but on the contrary has failed, refused and declined to pay said note and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, to payment in full of said note; that the plaintiff was duly notified of the default in accordance with the provisions of said instrument; that the damages sustained by these defendants on account of the default of said Gordon A. Robinson are in excess of $20,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, January 31, 1935, the following Motion of Receiver to be Substituted as Party Defendant was filed and allowed by the court.

MOTION OF FREDERICK S. DEITRICK, RECEIVER, TO BE SUBSTITUTED AS PARTY DEFENDANT.

[Filed and allowed January 31, 1935.]

[MEMORANDUM. Copy of motion to be substituted as party defendant is here omitted as it is identical with the motion already printed in this volume, on page 195 of this volume in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

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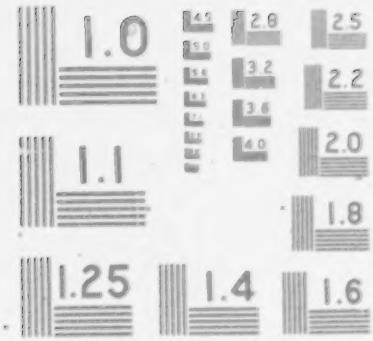

At the same term, to wit, February 2, 1935, a motion for a master was filed by the defendants, Boston-Continental National Bank and Frederick S. Deitrick, receiver.

On the fourth day of said February, the following Order Appointing Special Master was entered:

ORDER APPOINTING SPECIAL MASTER.

February 4, 1935.

[MEMORANDUM. Copy of order appointing special master is here omitted, as it already appears printed on pages 196, 197 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the notice of receiver to admit facts and answer of Standard Surety & Casualty Company to receiver's notice to admit facts are the same as those already printed on pages 27–35 in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term, A. D. 1935, when, to wit, April 10, 1935, the following Motion to Amend Bill of Complaint was filed and allowed:

MOTION TO AMEND BILL OF COMPLAINT.

[Filed and allowed April 10, 1935.]

[MEMORANDUM. Copy of motion to amend bill of complaint is here omitted, as it is identical with the motion to amend, already printed on page 198 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the pleadings and recitals are the same, down to the interlocutory decree, as those printed in case No. 3849, Equity, on pages 199–201 of this volume they are here omitted. JAMES S. ALLEN, *Clerk.*]

On the eighteenth day of June, A. D. 1936, the following Interlocutory Decree on master's report and exceptions thereto is entered:

INTERLOCUTORY DECREE.

June 18, 1936.

McLELLAN, J. This cause came on to be further heard at this term upon the master's report, the exceptions thereto, and the entry of a decree, and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the exceptions of the plaintiff to the conclusions of the master contained in his report that the bond and any instruments purporting to be endorsements or extensions thereof are enforceable by the receiver be and the same hereby are sustained, and that all other exceptions of both parties to said report be and the same hereby are overruled; and it is further

Ordered, adjudged and decreed that except as aforesaid said report be and the same hereby is confirmed.

By the Court,

JOHN E. GILMAN, JR.,

Deputy Clerk.

June 18, 1936.

H. D. M.,

D. J.

Also on the said eighteenth day of June, A. D. 1936, the following Final Decree is entered:

FINAL DECREE.

June 18, 1936.

McLELLAN, J. The above-entitled cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that said bond and any instruments purporting to be endorsements or extensions thereof are void and unenforceable as against the plaintiff, and that the defendant bank and the defendant receiver be, and they hereby are, perpetually enjoined from enforcing or attempting to enforce the same against the plaintiff by suit or otherwise; it is further

Ordered, adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed; and it is further

Ordered, adjudged and decreed that the defendant receiver pay to the plaintiff its costs, in a sum to be taxed by the clerk, and that execution issue therefor.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1936.

H. D. M.,
D. J.

MEMORANDUM.

March 18, 1936.

[MEMORANDUM. Copy of memorandum is here omitted, as it already appears printed on pages 139–141 of this volume, in case No. 5225, Law. JAMES ALLEN, *Clerk.*]

DEFENDANT'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.

[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it is identical with the one already printed on pages 146, 147 of this volume, in case No. 5225, Law, except that the "defendants" file the motion in this case and not the "plaintiff". JAMES S. ALLEN, *Clerk.*]

MOTION FOR SEVERANCE OF GORDON A. ROBINSON.

[Filed and allowed September 25, 1936.]

Now come Boston-Continental National Bank and Frederick S. Deitrick, receiver of Boston-Continental National Bank, aggrieved parties in the foregoing proceedings, who have claimed appeals to the United States Circuit Court of Appeals, and move a severance from

Gordon A. Robinson, a possible party in interest in these proceedings who has not claimed an appeal.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS.

September 25, 1936. Allowed.

HUGH D. MCLELLAN, *D. J.*

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the records on the appeals of the receiver of Boston-Continental National Bank, Frederick S. Deitrick, from the judgments and final decrees, and of the Boston-Continental National Bank from the final decrees, in the causes, in said District Court determined, entitled

No. 5225, LAW DOCKET,

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK (SUBSTITUTED FOR JOHN B. CUNNINGHAM, RECEIVER),

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE,

No. 5316, LAW DOCKET,

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK (SUBSTITUTED FOR JOHN B. CUNNINGHAM, RECEIVER),

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE,

No. 5317, Law Docket,

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank (Substituted for John B. Cunningham, Receiver),

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK et Trustee,

No. 3849, Equity Docket,

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.,

No. 3850, Equity Docket,

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.,

No. 3851, Equity Docket,

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.,

No. 3852, Equity Docket,

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.,

(the seven cases being consolidated for appeal); said transcript includes true copies of the proofs, entries and papers on file which were designated in the praecipe filed in the equity cases, and which were agreed upon in the law cases.

I further certify that transmitted herewith are the originals of the receiver's petition for appeal, the bank's petition for appeal, the citation on appeal of Frederick S. Deitrick, as Receiver, and the citation on appeal of the Boston-Continental National Bank, with the acknowledgments of service thereon.

In testimony whereof, I have hereunto set my hand and affixed the

seal of said District Court, at Boston, in said District, this twelfth day of March, A. D. 1937.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. Orders of enlargement of time for docketing case to, and including, March 12, 1937, are here omitted. A. I. CHARRON, *Clerk.*]

PROCEEDINGS IN CIRCUIT COURT OF APPEALS.

On April 27, 1937, this consolidated cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on June 1, 1937, the following Opinion of the Court was filed:

OPINION OF THE COURT.

June 1, 1937.

WILSON, J. In this appeal there were involved four suits at law brought by the receiver of the Continental National Bank of Boston, afterward consolidated with the Boston National Bank and known as the Boston-Continental National Bank, against the defendant-appellee to recover on certain surety bonds issued by an agent of the defendant purporting to secure the payment of certain promissory notes discounted at the Bank, and four suits in equity brought by the Surety Company to cancel said surety bonds, on the ground that they were fraudulently issued by the agent of the appellee without authority or knowledge. By stipulation of the parties the actions at law and the suits in equity are all joined for the purpose of appeal.

The actions at law were originally brought by John B. Cunningham in 1932, receiver. His respective successors as receiver were later joined as plaintiff, Deitrick being the last in order of succession, who was appointed in October, 1934. The use of the word "Bank" herein refers to the Continental National Bank up to December 27, 1930, and to the Boston-Continental National Bank as to all events taking place after that date, although there is no contention that the

Boston-Continental National Bank does not stand in the same relation to the Surety Company as the Continental National Bank.

The equity suits were referred to a master, to whom, as auditor, the law actions were also referred, and whose findings of fact were by agreement of the parties to be considered final. The facts as found by the master and auditor are substantially as follows:

In August, 1930, one Terrell M. Ragan, who was president of the Continental National Bank, and, after the consolidation, of the Boston-Continental National Bank, was indebted to one Cronin in an amount in excess of $20,000. Cronin was owing a third party $19,000 and was being pressed for payment. Cronin had given his check on the Continental National Bank to the third party in discharge of his indebtedness, although at the time he had no substantial balance at the Continental National Bank in his checking account. He sent to Ragan his note for $20,000 and informed Ragan that his check for $19,000 would be presented for payment, and, if not paid, it would mean trouble for them both.

Ragan gave Cronin's note to the discount clerk at the Bank and told him to discount the note and credit the proceeds to Cronin's checking account, which was done, and on presentation of Cronin's check for $19,000, it was paid. Cronin's note was unsecured and Ragan knew it was not a sound investment for the Bank.

Soon after September 1st, 1930, Cronin and Ragan went to Cliff, who was attorney in fact for the Surety Company, and requested him to write a surety bond in the name of the Surety Company to secure the Cronin note to the Bank. Ragan explained to Cliff that the bond would be only "window dressing" to show the bank examiners if they should ask to see the collateral for the Cronin note; that Cliff need not notify his company of the writing of such a bond, which would be valueless, as it would impose no liability on his company; and said further that Ragan as president of the Bank would give Cliff a release running to the Surety Company relieving it of all liability on the bond, which was later done.

They drew a bond on forms furnished to Cliff by the Surety Company, which Cronin as principal and Cliff for the Surety Company signed, running to the Bank, and purporting to secure the Cronin

note of $20,000, which obligation was renewed from time to time by endorsement by Cliff.

In December, 1930, Ragan requested Cliff to issue another and similar bond to secure a note of the Westchester Discount Corporation for $40,000, which Ragan assured Cliff was to enable Ragan to take up on his own account some stock in the proposed consolidation of the Boston National and the Continental National Bank; that the bank examiners might not be satisfied with the Westchester loan unless further secured, and that if the merger did not go through, Cronin, Ragan and Cliff might find themselves subject to criticism and would probably be ruined. Ragan assured Cliff that the bond would be used the same as the Cronin bond and only in case the examiners asked for collateral; that there would be no liability for the Surety Company and a similar release would be given as in the case of the Cronin bond. Cliff gave the bond as requested, and a release executed by Ragan for the Bank was given to Cliff dated December 23, 1930. (On the ground of a misdescription of the notes which this bond purported to secure, the auditor and master ruled that the receiver could not recover on this bond.)

On June 2, 1931, one Joseph Stone owed the bank on notes approximately $52,000. Ragan informed Cliff that the examiners were at the Bank and that he had informed them that these notes were covered by a surety bond, and if he, Cliff, would give the Bank another surety bond for $52,000, Ragan would be able to return all three bonds in a few days. Cliff again complied with this request, though why he did so in the first instance does not appear from the record.

On July 7 and 8, 1931, another surety bond covering a loan of one Gordon A. Robinson was issued by Cliff, a release to be given as in the other cases. Cliff was given to understand that this bond was also to be used to satisfy the bank examiners in case they called for collateral and no liability would result to his company.

To each of these bonds, except the Robinson bond, was attached a copy of the power of attorney issued by the Surety Company authorizing the signing of all bonds by Cliff. However, a letter of instruction, which was not attached to the bonds, limited the authority of

Cliff to issue bonds under such circu ances, which information was imparted to Ragan by Cliff.

All these transactions were carried out at the Bank by the assistant cashier and discount clerk under Ragan's direction. The bonds were handed to the clerk by Ragan and placed in the collateral files by the clerk. Neither the clerk nor any other official or employee of the Bank except Ragan had anything to do with obtaining the bonds or the endorsements approving the renewals of the notes. All the notes and bonds were discussed at directors' meetings, but were obtained by Ragan without prior consultation with any of his directors, and without prior action by the Board. While they were reported to the Board shortly after they were made, the circumstances under which they were issued were not disclosed to the Board.

An examination of the Bank's affairs in February and March, 1931, disclosed a capital impairment of $43,000, due to depreciation of investments and the Comptroller insisted that $300,000 of new capital be put into the Bank upon certain conditions, see *J. Dudley Clark* v. *Boston-Continental National Bank,* 9 Fed. Supp. 81. Clark put this amount in the Bank on June 29, 1931, after investigation of its affairs by himself and son, and upon the statement of Ragan that the loans of Cronin, the Westchester Discount Corporation, Stone and Robinson were secured by surety bonds. The master found that Clark, in part, at least, relied upon these bonds in making his investment, though he never saw the bonds. The Bank remained open until December, 1931, and after June 29, 1931, deposits were made by other depositors to the amount of $300,000, the depositors relying, as the master and auditor found, principally on the fact that the Bank was open for the transaction of business, due indirectly to these bonds, though there is no evidence that the depositors other than Clark knew of the bonds being given.

The power to borrow money is one of the usual attributes of the banking business. *Auten* v. *United States Bank of New York,* 174 U. S. 125, 141, 143. So, too, the obtaining and taking of collateral for a loan must be within the legitimate scope of that business; and a president of a bank and its general manager, therefore, has authority to negotiate a loan and to take collateral therefore without being pre-

viously authorized by the board of directors. It being within the scope of his authority, any notice to him of its illegality is notice to the bank. *Aldrich* v. *Chemical Natl. Bank,* 176 U. S. 618, 627. The master and auditor so ruled.

No question is raised as to the authority of the Surety Company to issue similar bonds under proper circumstances, and the power of attorney of Cliff was broad enough to authorize him to write bonds of this type, though his letter of instructions limited his authority in this respect. There is no evidence that Cliff personally benefited in any way by issuing the bonds, or that any premiums were paid to him.

The master and auditor ruled as a matter of law that the bonds were not binding obligations in the hands of the Bank as a going concern for the reason that the knowledge of Ragan as to their infirmities was imputed to the Bank, and that they were not binding obligations in the hands of the receiver, if his rights were derived through the Bank as distinguished from the creditors.

Here is the principal issue in the case. The master and auditor held that the receiver in bringing these actions did not derive his right of recovery through the Bank, but because one or more creditors of the Bank were deceived, and as he represents creditors he derived his right of action through them. The receiver, however, makes no such allegations in his declaration, a copy of which is typical of the declarations in each law action, with the necessary changes as to the principal and the amount, and is as follows:

> "Now comes the plaintiff in the above-entitled action and says that on December 22, 1931, he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States; that he duly qualified and is now acting as such receiver.
>
> And the plaintiff says that the defendant duly entered into, executed under seal and delivered to the Boston-Continental National Bank, a national banking association duly organized by law, with an usual place of business in Boston, a written instrument or bond, copy whereof is hereto annexed marked "A" and hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay Boston-Continental Na-

tional Bank the sum of . . . in the event that . . . of . . . in said District, failed within one year from the date of the bond, to wit, June 2, 1931, to make full and true payment to the Boston-Continental National Bank of an obligation in the sum of . . . ; that the condition of said bond as aforesaid has been broken, in that . . . the principal named therein, has not paid the obligation described in said bond, according to its terms, except the sum of . . . ; but on the contrary has failed, refused and declined to pay said obligation and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said obligation; that the defendant was duly notified of the default in accordance with the provisions of the bond; that the damages sustained by the defendant on account of the default of said . . . are in excess of . . .

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond, with interest from . . . 1931.

And the plaintiff says that this is an action at law arising under the Constitution and the laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States."

A receiver of a national bank under the banking laws is not the agent of the creditors. He represents them only in that what he does may be for their benefit. An agent is appointed by his principal and is responsible to him. The creditors of a national bank do not appoint the receiver. He is responsible only to the Comptroller. If creditors have certain rights personal to them, the receiver cannot enforce such rights. *Michelsen et al.* v. *Penney,* 10 Fed. Supp. 537, 539, 540.

It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the Bank. In such an action he stands no better than the Bank itself. All defenses open against the Bank in such a case are open against the receiver, and he is chargeable with knowledge of all facts known to the bank affecting the character of

the claim. While there are decisions by state courts to the contrary, the federal decisions support this position. *Scott* v. *Armstrong,* 146 U. S. 499, 507; *Cutler* v. *Fry,* 240 Fed. 238; *Yates Center National Bank* v. *Schaede,* 240 Fed. 240; *Yates Center National Bank* v. *Lauber,* 240 Fed. 237; *Fourth Street Bank* v. *Yardley,* 165 U. S. 634, 653; *Skud* v. *Tillinghast,* 195 Fed. 1, 5; *Peterson* v. *Tillinghast,* 192 Fed. 287, 289; *Keyes* v. *First National Bank,* 20 Fed. (2d) 678, 686; *Burrowes* v. *Nimocks,* 35 Fed. (2d) 152, 159; *Schumacher* v. *Eastern Bank & Trust Company,* 52 Fed. 925, 928–9; *Rankin, Receiver* v. *City National Bank,* 208 U. S. 541, in which case it was held that where the president of the insolvent bank had manipulated the accounts of the bank by giving a note for which no consideration passed, the only purpose of the transaction "in fact and contemplation was a swindle upon the bank examiner." The court said that "The whole business, from beginning to end, was and was intended to be a mere juggle with books and paper to deceive the bank examiner", and that if the insolvent bank "had sued while it was a going concern it could not have recovered and the receiver stands no better than the bank." The facts of this case are more fully stated in *Cherry* v. *City National Bank,* 144 Fed. 587, 591.

If therefore, the contract with the Surety Company was illegal as to the Bank, because, as the master and auditor found that the Bank was charged with the knowledge of its president, a recovery based on the contract of surety cannot be had by the receiver, since a recovery must be based on the pleadings, and the allegations of liability in the plaintiff's declarations are based solely on the contract of surety. *Hookway* v. *First National Bank,* 36 Fed. (2d) 166, 170; *McMullen* v. *Hoffman,* 174 U. S. 639. There is no allegation in the declarations at law that the receiver based his grounds of action on any alleged deception of, or injury to, any ceditors of the Bank, or any alleged deception of, or injury to, any creditors of the Bank, or the surety bonds, nor does the receiver allege that he is suing on account of any creditors so injured.

The grounds of the actions at law are that the bonds alleged to have been issued by Cliff to secure the notes of the several parties referred to in the declarations were between the Surety Company and

the Bank, and were valid, binding obligations. There is no allegation in the declarations that the receiver derived his right of action other than from the contract of suretyship entered into between the Surety Company and the Bank. The receiver cannot rely on these bonds as a basis for recovery without being bound by Ragan's knowledge of their invalidity, which the master found was imputed to the bank. *Keyes* v. *First National Bank, supra,* p. 686; *Curtis, Collins & Holbrook Co.* v. *United States,* 262 U. S. 215, 222, 223; *Munroe* v. *Harriman et al.,* 85 Fed. (2d) 493, 495.

As to whether the receiver by proper allegations of an injury to creditors, if based on facts, could have recovered in an action brought for the benefit of such creditior or creditors, is not raised by the pleadings.

We think the auditor and master in his report went outside the issues raised by the pleadings, since the actions at law are clearly based on the contract between the Surety Company and the Bank, in which case the receiver stands no better than the Bank would have if an action had been brought in the name of the Bank while it was a going concern.

The questions of whether the receiver, having brought an action against the Fidelity & Deposit Company to recover on a bond issued to indemnify the Bank against the unlawful acts of Ragan in taking these bonds, the Surety Company can defend on the ground of an election of remedies, see *Minneapolis National Bank* v. *Liberty National Bank,* 72 Fed. (2d) 434, 436, or for lack of notice of default in the payment of the notes, we do not decide, since there can be no recovery by the receiver on the pleadings in the case.

The judgments of the District Court in the law actions are affirmed.

The decrees in the equity suits and dismissing the counter-claims are affirmed with one bill of costs in this court to the appellee.

On the same day, to wit, June 1, 1937, the following Judgment and Final Decree was entered:

JUDGMENT AND FINAL DECREE.

June 1, 1937.

This cause came on to be heard April 27, 1937, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, June 1, 1937, here ordered, adjudged and decreed as follows: The judgments of the District Court in the law actions are affirmed. The decrees in the equity suits and dismissing the counter-claims are affirmed with one bill of costs in this court to the appellee.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on June 19, 1937, the following Petition for Rehearing was filed by appellants by leave of court:

PETITION FOR REHEARING.

[Filed June 19, 1937, by leave of Court.]

Now come the appellants in the above-entitled cases (consolidated for purposes of appeal in this court) and say that this Honorable Court (Bingham, Wilson and Morton, JJ.) has handed down an opinion in said cases affirming the judgments and decrees of the District Court for the District of Massachusetts.

Said appellants present this their petition for rehearing on the above-entitled cases for the following reasons:

Set out below are two paragraphs respectively appearing on pages 7 and 8 of the opinion of the Court:

> "If, therefore, the contract with the Surety Company was illegal as to the Bank, because, as the master and auditor found that the Bank was charged with the knowledge of its president, a recovery based on the contract of surety cannot be had by the receiver, since a recovery must be based on the pleadings, and the allegations of liability in the plaintiff's declarations are based solely on the contract of surety. Hookway v. First National Bank, 36 Fed. (2) 166, 170; McMullen v. Hoffman, 174

U. S. 639. There is no allegation in the declarations at law that the receiver based his grounds of action on any alleged deception of, or injury to, any creditors of the Bank, or that any creditors were directly or indirectly injured by the giving of the surety bonds, nor does the receiver allege that he is suing on account of any creditors so injured."

"As to whether the receiver by proper allegations of an injury to creditors, if based on facts, could have recovered in an action brought for the benefit of such creditor or creditors, is not raised by the pleadings."

From the foregoing it appears that the court affirmed the action of the District Court primarily, if not solely, on the ground that the actions at law sought only to enforce contracts which the Court ruled, on the facts found, could not be enforced either by the Bank or by its receiver. The Court appears to have overlooked the fact that the Standard Surety & Casualty Company of New York filed bills in equity seeking the cancellation and surrender of the several bonds and that in each such case in equity the receiver incorporated in his answer to the bill of complaint a counterclaim coupled with general prayers for relief reading as follows:

"(1) That the Court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its Receiver, and order the plaintiff to pay the same with interest.

"(2) For such further relief as the Court finds meet and just" (R. pp. 195, 231, 253, 275).

It is submitted that, even if the actions at law on the contracts contained in the several bonds could not be enforced for the reasons stated in said opinion, the receiver is entitled to whatever relief in equity may be appropriate in aid of the execution of his trust for the benefit of the depositors of his bank; that the depositors were found by the master to have suffered loss by reason of the conduct of the agent of the Surety Company, and that, therefore, such damage can upon the pleadings and the findings in the record, be the subject of decrees in favor of the receiver.

Wherefore the appellants respectfully pray that a rehearing of said cases be granted.

By their Attorneys,

GOODWIN, PROCTOR & HOAR,
ROBERT E. GOODWIN,
Attorneys for Petitioners, Appellants.

CERTIFICATE.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. JUNE 19, 1937.

I, Robert E. Goodwin, of counsel for the petitioners, appellants, hereby certify that the above petition is presented in good faith and not for purposes of delay.

ROBERT E. GOODWIN.

Thereafter, to wit, on June 29, 1937, the following Opinion of the court on Petition for Rehearing was filed:

OPINION OF THE COURT ON PETITION FOR REHEARING.

June 29, 1937.

PER CURIAM. The defendants in the equity suits seek to have a rehearing on the ground that in their counterclaim in their answers to the several equity suits they asked the court to determine the amount due from the Standard Surety & Casualty Company to the Boston-Continental Bank and to its receiver.

The petition should be denied. The law actions were brought on certain bonds executed by an agent of the defendants, and the equity suits were brought by the defendants to cancel the bonds.

The issue raised by the pleadings was as to the validity of these bonds as binding obligations in the hands of the receiver. No other issue was raised or tried than the validity of these bonds, except the question of an election of remedies.

The plaintiffs cite their prayer in their petition for rehearing, but a prayer must follow the allegations in the complaint or counterclaim. The plaintiffs' counterclaim distinctly raises the question of the validity of the bonds. The issue of trust for the benefit of creditors is not raised or suggested.

The plaintiffs in their brief filed in this court say: "Amendment of the pleadings have made the issues raised in the three law actions identical with the issues raised in the equity cases based on the same bonds."

The master evidently so understood the issue. In the opening paragraph of his report he states:

"These seven cases raise the question whether the Standard Surety & Casualty Company of New York (hereinafter called the Surety Company) is liable to the receiver of the Boston Continental National Bank upon four bonds written in the name of the Surety Company by its attorney in fact, Percy G. Cliff. . . . Amendments of the pleadings have made the issues raised in the law and equity cases identical."

At the conclusion of his report he says, after a finding as to the amounts due in the law cases:

"As to the prayers of the Surety Company, all bills in equity should be dismissed. As to the prayers of the receiver, the Westchester case (Eq. No. 3851) should be dismissed, but in the other three cases a decree should be entered ordering the company to pay to the receiver the *amounts specified.*" (Italics supplied.)

The District Court so understood the issues. In his memorandum of decision he says:

"As stated by the master and auditor, these seven cases raise the question whether the Standard Surety & Casualty Company of New York is liable to the receiver of the Boston Continental National Bank upon four bonds written in the name of the Surety Company by its attorney-in-fact, Percy G. Cliff. The bonds purported to guarantee payment respectively of a note of $20,000 made by Arthur D. Cronin, a note of $40,000 made by Westchester Discount Corporation, a note of $52,000 made by Joseph Stone and a note of $20,000 made by Gordon A. Robinson. In the four equity cases the Surety Company seeks to have the bonds cancelled; the receiver counterclaims upon the bonds. The three law cases are actions by the receiver upon the Westchester, Stone and Robinson bonds. Amendments of the pleadings have made the issues raised in the law and equity cases identical."

No issue is raised in the plaintiffs' brief except as to the validity of the bonds. The obligations of the Surety Company based on

the depositors of the bank being injured by the giving of the bonds, and the receiver's claim against the Surety Company based on a trust relationship are not mentioned, and, we think, are not raised by the plaintiffs' counterclaim in the equity suits.

The petition for rehearing is denied.

On the same day, to wit, June 29, 1937, an order denying said petition for rehearing was entered.

Thereafter, to wit, on July 2, 1937, upon motion by appellants, mandate was stayed until further order of court.

CLERK'S CERTIFICATE.

I, Roger A. Stinchfield, Deputy Clerk of the United States Circuit Court of Appeals for the First Circuit, and, during the temporary absence of the clerk, in charge of the clerk's office of said court and custodian of its files and records, certify that the printed pages numbered 1 to 293, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including July 2, 1937, in the cause in said court numbered and entitled:

No. 3231.

FREDERICK S. DEITRICK, RECEIVER, ET AL., APPELLANTS,

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, APPELLEE.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twelfth day of July, A. D. 1937.

ROGER A. STINCHFIELD,

[SEAL] *Deputy Clerk.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.